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DECISIONS
RELATING TO
THE PUBLIC LANDS.

WINNIE D. HUNT.

Decided March 4, 1916.

CITIZENSHIP—MARRIAGE TO FOREIGNER—DIVORCE.

Where an American-born woman who has lost her citizenship by marrying a foreigner returns to this country and procures a divorce she thereby regains her American citizenship and becomes qualified in that respect under the homestead laws, without the necessity of naturalization.

JONES, First Assistant Secretary:

Winnie D. Hunt appealed from decision of June 3, 1915, holding her homestead entry for N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, and NE. $\frac{1}{4}$, Sec. 26, T. 1 N., R. 47 E., W. M., La Grande, Oregon, for cancellation, on the ground that she is disqualified to make entry.

Claimant was a native-born citizen of the United States. December 5, 1908, she married Robert Hunt, an English citizen, and under the provisions of the act of March 2, 1907 (34 Stat., 1228), thereby became a British subject. March 9, 1915, she made entry as a widow, having one child, and head of a family. It appears, however, she is not a widow, but a deserted wife, her husband having left her and returned to England. She has established residence on the land and improved it. The Commissioner held that as the marital status still exists, she is not qualified to make entry, and held it for cancellation.

The act of March 2, 1907, *supra*, section 3, provides:

That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

The act also provides that a foreign woman who acquires American citizenship by marriage to an American citizen is presumed to retain her acquired American citizenship, "unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens."

It thus appears that a foreigner who acquires citizenship by marriage to an American citizen may reassert her foreign citizenship by a mere renunciation filed in a proper court.

The homestead law allows a deserted wife to make an entry. The fact of desertion gives her, for the purposes of homestead entry, the status of a single woman over 21 years of age.

The appeal states that Mrs. Hunt, being deserted by her husband, has a suit for divorce pending, and asks the Commissioner's decision "be reversed or that the filing be suspended until such time as appellant shall have secured a divorce."

The record here did not show whether a divorce had been secured or not.

The department required her to show termination of her marital relation. February 29, 1916, she filed authenticated copy of decree of divorce granted to her August 24, 1915, by circuit court, Wallowa County, Oregon.

In view of the provisions of the act of March 2, 1907, *supra*, it does not appear that a naturalization of this native-born American woman is required to revest her with American citizenship. The marital relation having terminated, and she having returned to this country to reside therein her citizenship is regained.

The decision of the Commissioner is therefore modified, and the entry will remain intact.

HUGHES v. HEIRS OF MEADOWS.¹

Decided March 10, 1916.

INSANE ENTRYMAN—RIGHT OF HEIRS—ACT OF JUNE 8, 1880.

Where the right of an insane entryman to patent under the act of June 8, 1880, fully vested prior to his death, such right descends to his heirs, and patent may issue to them upon submission of proper proof.

JONES, *First Assistant Secretary*:

The heirs of Laban Meadows have appealed from the decision of the Commissioner of the General Land Office of September 23, 1915, holding for cancellation homestead entry of Laban Meadows, made July 1, 1908, for the SW. ¼, Sec. 33, T. 19 N., R. 27 E., Clayton, New Mexico, land district.

On January 4, 1915, Edwin H. Hughes filed amended affidavit of contest against this entry, charging that:

Laban Meadows abandoned said land on or about the 20th day of November, 1912, and has since that time failed to reside upon or cultivate any part of said land.

Affiant states that he is informed and believes that said Laban Meadows died at Frisco, Texas, on or about the 10th day of January, 1914. That since the

¹ See decision on motion for rehearing, p. 4.

date of the death of said entryman his heirs have failed to cultivate any part of said land.

Affiant further states that he has made diligent search and inquiry regarding the names and places of residence of the heirs of said Laban Meadows, but is unable to learn either their names or addresses. That F. H. Hartzog of McKinney, Texas, is administrator of the estate of said Laban Meadows.

Answer was duly filed and a hearing had on April 10, 1915, the parties appearing and submitting testimony, from which it appears that entryman established residence on the land at the time he made entry therefor, and resided thereon until November 20, 1912. He applied for and was granted a leave of absence from October 20, 1912, to May 20, 1913, but never returned to the land, having been adjudged insane in December, 1913, and died in January, 1914.

It can not be said that entryman abandoned the land prior to six months from the expiration of the leave of absence, *Matics v. Gilidett* (35 L. D., 353); and the presumption that he was insane at that time is fully warranted in view of his previous condition, and of the fact that he was so adjudged in the following month.

The testimony has been very carefully considered, and the Department is unwilling to cancel this entry on the showing made. It appears that the entryman was an old man, feeble of mind and body, but nevertheless substantially complied with the requirements of the law for nearly 4½ years, cultivating approximately 18 acres, fencing the entire tract, and constructing a house 12x18 feet, and a small barn.

Not being in default prior to becoming insane he was entitled to a patent under the act of June 8, 1880 (21 Stat., 166), which provides:

That in all cases in which parties who regularly initiated claims to public lands as settlers thereon according to the provisions of the pre-emption or homestead laws, have become insane or shall hereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane.

This right having fully vested prior to entryman's death descended to his heirs, and patent will issue upon formal submission of final proof.

The decision of the Commissioner is reversed.

HUGHES v. HEIRS OF MEADOWS (On Rehearing).

Decided May 10, 1916.

INSANE ENTRYMAN—RIGHT OF HEIRS—CONFLICTING DECISION MODIFIED.

Departmental decision in *Heirs of Anthony Siankiewicz*, 38 L. D., 574, modified in so far as it holds that the act of June 8, 1880, "can be applied only in case the entryman be living at the time the application is made to offer proof."

JONES, *First Assistant Secretary*:

Edwin H. Hughes has filed motion for rehearing of departmental decision herein of March 10, 1916 (45 L. D., 2), reversing that of the Commissioner of the General Land Office of September 23, 1915, wherein the homestead entry of Laban Meadows, made July 1, 1908, for the SW. $\frac{1}{4}$, Sec. 33, T. 19 N., R. 17 E., Clayton, New Mexico, land district, was held for cancellation.

All the propositions embraced in the various assignments of error contained in this motion were fully considered by the Department when the case was pending on appeal from the Commissioner's decision, and while no new question of law or fact is presented, the citation of the cases of *Lyman v. Baldwin's Heirs* (28 L. D., 5), and the *Heirs of Anthony Siankiewicz* (38 L. D., 574), in support of the assignment of error in holding that the right of an insane entryman to a patent under the act of June 8, 1880 (21 Stat., 166), descends to his heirs, calls for further consideration of these cases with specific reference thereto.

In the former case a contest against the heirs of a deceased entryman who had complied with the law prior to becoming insane, was disposed of upon the sole ground that the same was prematurely brought, and the question of whether the act of June 8, 1880, *supra*, was applicable, was not considered. This case, therefore, is not authority for the contention of the contestant herein.

The statement in the latter case that "the act can be applied only in case the entryman be living at the time the application is made to offer proof," is mere dicta, and will not be followed.

No good and sufficient reason appears for disturbing the former decision herein, and the motion for rehearing is, therefore, denied.

DIXON v. DRY GULCH IRRIGATION CO.

Decided March 10, 1916.

RIGHT OF WAY—DOUBLE USE OF RESERVOIR SITE.

It is the policy of the land department to secure the utilization of reservoir sites to the largest extent possible, and where that purpose can be best attained by joint or double use of reservoir sites such use will be permitted.

JONES, *First Assistant Secretary*:

John D. and Leroy Dixon appealed from decision of January 15, 1915, rejecting their reservoir application in T. 2 N., Rs. 5 and 6 W., U. M., Vernal, Utah, for conflict with prior right of the Dry Gulch Irrigation Company.

June 6, 1910, the irrigation company's application was approved by the Department. April 6, 1912, the Dixons applied, under acts of March 3, 1891 (26 Stat., 1095), and May 11, 1898 (30 Stat., 404), for practically the same reservoir site and right of way for canal in connection therewith. The Commissioner found the application entitled to approval, except for conflict with the Dry Gulch Irrigation Company's prior right.

November 29, 1913, he suspended the Dixons's application for sixty days to enable them to obtain relinquishment of the prior franchise. They did not obtain such relinquishment but, instead, filed an argument based on claim that the Dry Gulch Irrigation Company had not prosecuted their franchise and had not spent over \$100 in work upon the reservoir site. The Commissioner also issued a rule upon the irrigation company to relinquish within thirty days or show cause why the Dixons's application should not be approved under the rule in case of H. H. Tomkins (41 L. D., 516). The company filed return to the rule showing that they had approved water rights from the proper office in the State of Utah for 497.1 cubic feet per second; that their company was a purely cooperative one and had expended upon canals the sum of \$217,888.45; and its membership owned more land than the ordinary flow of the stream would irrigate, wherefore the company desired to retain its interest in the reservoir site to be able to store water for its membership. It admits it has only spent \$952.27 directly in work on the reservoir. It shows also that it has been led into litigation with the Dixons, which litigation has somewhat impaired its work. It is now furnishing water to owners of 21,285 acres, and the intent of the project is to fully reclaim 100,000 acres.

It is urged in the appeal that appellants be permitted to show that the reservoir in question is sufficient to hold all of the waters named by the Dry Gulch Company under its application and by the Dixons under their application, and that the reservoir can be used by the latter without interference or injury to the use and occupation proposed to be made thereof by the Dry Gulch Company.

It is the policy of this Department to secure the utilization of reservoir sites to the largest extent possible, and if that end can be attained by double use, it is believed that same should be permitted. Such is the effect of the principle announced in the cases of the Deseret Irrigation Company *et al.* (40 L. D., 463) and H. H. Tomkins (41 L. D., 516).

Upon full consideration of the record, therefore, the decision of the Commissioner of the General Land Office is modified, and the case remanded, with direction that the applicants, John D. and Leroy Dixon, be allowed to submit showing that the proposed reservoir site is of sufficient capacity to hold the waters proposed to be impounded both by the Dixons and the Dry Gulch Irrigation Company, and that a joint utilization of the site is feasible. Such showing as they may file shall be served upon the Dry Gulch Company, with opportunity to respond, and the case readjudicated upon the showing made, or hearing ordered if such an issue is raised as to require formal submission of evidence.

DELANY v. NORTHERN PACIFIC RY. CO.

Decided March 11, 1916.

NORTHERN PACIFIC SELECTIONS—ACT OF MARCH 2, 1899.

The Department will not at this late date question the right of the Northern Pacific *Railway* Company to select lands under the act of March 2, 1899, as successor to the Northern Pacific *Railroad* Company, on the ground that at the date of that act the Northern Pacific *Railroad* Company, named as grantee therein, had been foreclosed and was no longer a going concern, and that the act was therefore ineffective for want of an existing grantee.

JONES, *First Assistant Secretary*:

Belden M. Delany filed petition for exercise of supervisory power of the Secretary of the Interior to vacate and recall departmental decision of November 18, 1915, and that of January 29, 1916, denying his motion for rehearing in the case between him and the Northern Pacific Railway Company, involving his settlement claim to NE. $\frac{1}{4}$, Sec. 20, T. 43 N., R. 4 E., B. M., Coeur d'Alene, Idaho, on the ground of the railway company's prior right as selector.

The ground of the petition is that the selection of the land in terms of a future survey made in the company's prior selection is illegal and void under the clear and unmistakable language in the decision in *Daniels v. Northern Pacific Ry. Co.* (43 L. D., 381). There is also a contention that the Northern Pacific Railroad Company had been foreclosed and had gone out of existence before this selection was made and before the act of March 2, 1899 (30 Stat., 993), wherefore it is claimed the act was ineffective for want of an existing grantee.

Counsel misinterprets the decision in 43 L. D., 381, referred to. The Department held that:

Not only have descriptions of unsurveyed land in terms of a future survey been recognized in departmental practice, but, as has been stated, such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land. Indeed, in the instructions of May 9, 1899 (28 L. D., 521), under the act of June 4, 1897, *supra*, was

incorporated a provision broad enough to cover all selections of unsurveyed land under any act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable.

The act of March 2, 1899, authorized the railroad company to make selections of unsurveyed public lands. Section 4 requires that in case the tract selected should at the time of the selection be unsurveyed the list filed by the company in the local land office should describe the tract "in such manner as to designate the same with a reasonable degree of certainty," and requires a new list to be filed redescribing the land after the survey has been made. The description employed in this particular selection, under the decision in *Daniels v. Northern Pacific Railway Company*, *supra*, complied with the statute, as it was made with a reasonable degree of certainty. The petitioner's contention as to this feature of the case is accordingly not well founded.

The second point of contention, if conceded, would work ruin over the entire northwest in all the States through which the Northern Pacific Railway Company passes. It would nullify the acts of March 2, 1899, and July 1, 1898 (30 Stat., 620), for both acts name the Northern Pacific Railroad Company as authorized thereby to make selections. It is true the railroad company had ceased to be an active corporation by foreclosure of all its rights and franchises and sale to its bondholders who reorganized under the name of the Northern Pacific Railway Company, and that company, as successor to the railroad company, has been recognized in the opinions of the Attorney General, February 6, 1897 (21 Op., 486), and March 18, 1905, referred to in departmental decision (33 L. D., 636). It has also been recognized in numerous departmental decisions, among which are *Ferguson v. Northern Pacific Ry. Co.* (33 L. D., 634, 636); *Jones v. Northern Pacific Ry. Co.* (34 L. D., 105, 106); *Northern Pacific Ry. Co. v. Santa Fe Pacific R. R. Co.* (36 L. D., 368, 369); *Vold v. Northern Pacific Ry. Co.* (38 L. D., 378); *Dube v. Northern Pacific Ry. Co.* (42 L. D., 464-5).

The Department will not now hold that the act of March 2, 1899, *supra*, was void because no such corporation as the Northern Pacific Railroad Company was then a going concern.

The petition is denied.

HEIRS OF THERESA BODE.

Decided March 13, 1916.

FINAL PROOF DURING PENDENCY OF CONTEST.

Final proof may be submitted during the pendency of a contest and suspended until final determination thereof; and while such proof should not be considered in determining the merits of the contest it may be used for the purpose of cross-examination during the trial.

AMENDMENT OF RULE 46 OF PRACTICE.

Directions given for amendment of Rule 46 of the Rules of Practice to conform to the views herein expressed.

JONES, First Assistant Secretary:

The heirs of Theresa Bode have appealed from the decision of the Commissioner of the General Land Office, dated May 20, 1915, reversing the recommendation of the register and receiver, and holding for cancellation homestead entry No. 14082, embracing the SE. $\frac{1}{4}$, Sec. 20, T. 13 N., R. 9 W., W. M., Vancouver, Washington, land district.

The homestead entry was made October 17, 1906. Proceedings were directed against it by the Commissioner's order of June 6, 1913, upon the following charges, preferred by a special agent:

1. That claimant, prior to her death did not establish and maintain residence upon the land.
2. That claimant prior to her death did not cultivate the land.
3. That since claimant's death her heirs have not cultivated or resided upon the land.

A denial of the charges and the application for a hearing were filed by the heirs of the entrywoman July 28, 1913. From the decision of the register and receiver, it appears that the heirs submitted final proof October 29, 1913, which apparently was suspended. The hearing was held August 11, 1914.

The Commissioner, referring to the final proof so submitted, stated as follows:

No proof is found with the record; you state that final proof was submitted by entrywoman's heirs on October 29, 1913; it is presumed that you have retained said proof under Rule 46 of Practice, but said rule does not authorize the submission of proof during the pendency of a contest until after trial has taken place, so that, even were the proceedings to be dismissed, it appears that new proof would be required.

In the case of *Bailey v. Townsend* (5 L. D., 176) it was held that final proof should not be submitted during the pendency of a contest. This rule was reaffirmed in *Laffoon v. Artis* (9 L. D., 279), which further directed that the local officers should not allow such final proof to be made until final determination of the contest. The rule was adhered to in *Scott v. King* (9 L. D., 299), and *Eastlake Land Company v. Brown* (9 L. D., 322). This resulted in the regulations of March 15, 1892 (14 L. D., 250), amending rule 53 of the then-existing Rules of Practice, to the effect that final proof might be submitted where a contest had been brought and the trial had taken place. The same rule is in substance found in rule 46 of the present Rules of Practice, which provides:

Where trial of a contest brought against any entry or filing has taken place, the entryman may submit final proof and complete the same, with the excep-

tion of payment of the purchase money or commissions, as the case may be; such final proof will be retained in the local office, and, should the entry be adjudged valid, will, if satisfactory, be accepted upon payment of the purchase money or commissions, and final certificate will issue without further action on the part of the entryman, except the furnishing by him, or in case of his death by his legal representatives, of nonalienation affidavit.

In such cases the party making the proof will at the time of submitting same be required to pay the fees for reducing the testimony to writing.

While the statement of the Commissioner is in harmony with the existing adjudications and procedure of the Department, I am of the opinion that the existing procedure is not well advised. There would seem to be no good reason to prohibit an entryman from submitting final proof during the pendency of a contest—such proof to be suspended until the final determination thereof—provided that the proof should not be considered in determining the merits of the contest. Such proof might be used for the purpose of cross-examination during the trial of the contest, and the time for the taking thereof should be so fixed as not to interfere with the contest proceedings. This would appear especially true in the present case, since the final proof was submitted approximately at the time of expiration of the statutory period for making it.

The Commissioner, accordingly, will redraft Rule 46 of the Rules of Practice, so as to conform with the above holding. [See 45 L. D., 91.]

Prior to the making of the present entry the land involved in the entry of one Miller, whose improvements Theresa Bode purchased for the sum of \$200. The entrywoman, prior to making the entry, had been living with one or the other of two of her daughters, each of whom owned a house in the town of South Bend, Washington. She was 74 or 75 years old at the time of making entry, October 17, 1906. The following January, before going to the land, she suffered a stroke of apoplexy, following which she had fits of an epileptic character. These became frequent, necessitating the presence of some other person. It was also important to be within reach of medical assistance, and it appears that the entrywoman received medical treatment from several physicians, successively, following her physical breakdown in January, 1907. The land was about 6 miles distant from South Bend, by road or trail. The entrywoman does not appear to have owned any vehicle except a tricycle. Her daughters testify, in effect, that it was necessary that someone be always near.

It appears that the entrywoman went to the land on or about March 9, 1907, and, after repairing the dwelling already erected on the land, occupied it, placed in it furniture, utensils, etc., and spent several days there. It is alleged in behalf of the heirs that the entrywoman went to the land about eight times in 1907, remaining each time from one night to three or four days, once for a week

or two, and on one occasion was there nearly a month; that she was on the land about 10 times in 1908, and once for four or five days, in February, 1909; that she was then taken to California, where, on May 11, 1909, she died.

The land is covered with timber, variously estimated at from one to one-and-a-half million feet. It is admitted that the cost of clearing would be very heavy. A special agent of the General Land Office, who examined the land as late as September 27, 1914, testified that he found, as the result of actual measurement, the slashed area to be somewhat less than an acre, and the cleared area, excluding the ground occupied by the cabin, less than one-third of an acre. The cultivation of the land has been so slight as to be negligible. Most of the slashing was done by prior entrymen, one of whom built the cabin.

A fuller statement of the case appears in the Commissioner's decision appealed from, but, from the above resume and the entire record, it is apparent that the compliance of the entrywoman and that of her heirs, considered together, was not sufficient to fulfill the requirements of the homestead laws. In this connection, see *Ruth McNickle* (11 L. D., 422); *Smith v. Hustead* (35 L. D., 376); *Benjamin Chainey* (42 L. D., 510); and as to the measure of compliance to be performed by heirs of deceased entrywoman, *Meeboer v. Heirs of Schut* (35 L. D., 335).

The decision of the Commissioner is accordingly affirmed.

WASATCH MINES COMPANY.

Decided March 15, 1916.

CONFLICTING LODE MINING CLAIMS—THEORETICAL EXCLUSIONS.

Where exclusions are made from mining claims of supposed conflicts with a prior patented claim, and the position of the prior patented claim as actually marked, defined and established upon the ground is not identical with its position as represented upon the plat and described in the field notes of survey, and the supposed conflicts have no existence in fact, the areas represented by such theoretical exclusions pass under the patents to the claims and are therefore not subject to appropriation by subsequent location.

JONES, First Assistant Secretary:

This is an appeal by the Wasatch Mines Company from a decision of the Commissioner of the General Land Office dated September 22, 1913, holding for cancellation, because the area has been already patented, mineral entry 013291, for the Emma Copper lode claim, survey 5940, situate in Sec. 32, T. 2 S., R. 3 E., S. B. M., Salt Lake City land district, Utah.

This is a case in which the entire area applied for is embraced within the theoretical limits of the patented Highland Chief claim. The Highland Chief claim, survey 81, is represented upon the plat of survey 5940 in two positions. In its position as actually marked, defined and established upon the ground, it is to the north of and entirely outside of the limits of the Emma copper claim here applied for, while in its position as represented upon the plat and described in the field notes of survey 81, it lies wholly within the limits of said Emma copper claim. It further appears that the total area of said Highland Chief claim, as represented by survey 81 and lying within the limits of the Emma copper claim, is entirely covered by other mining claims heretofore patented which have expressed exclusions of the supposed conflict with said Highland Chief claims. It now appears as a matter of fact that there was no such conflict. The attempted exclusions by those patented claims of this area was therefore without force and effect and said area passed to said claims under their patents.

It is urged in the appeal that the prior patented claims referred to excluded certain specific areas or tracts which may be identified by a reference to the field notes of the surveys of said claims and that these areas remained public lands of the United States subject to appropriation under the mining law. With this the Department cannot agree. In the case of *United States Mining Company v. Wall* (39 L. D., 546), in which there was a situation similar to the one here presented, it was said:

As far as either or all of the surveys are concerned, the position of each claim, and their relative positions, must be determined as the claims are defined and established upon the ground, and all errors of description of the position of either claim, and of the conflicts between them, must give way thereto, in accordance with the rule in the case of *Sinnott v. Jewett* (33 L. D., 91). Indeed, it is plainly evident that it was the intention in this case to exclude from the Northern Light claim the actual, and not a theoretical, conflict with the Grizzly.

Upon motion for rehearing in the case last above cited, the Department on March 24, 1913, ordered a hearing for the purpose of permitting the protestant company to establish *prima facie* that the amended survey of the Grizzly is coincident and identical with and covers the same tract of ground as was included in and delimited by, the original survey of that claim. It was not, however, the purpose or effect of said decision to overrule the principle laid down in the decision rendered upon appeal. This is indicated by the following expression:

It is further contended that the exclusion made in the Northern Light patent is of a tract described by metes and bounds, referable primarily to the lines of that claim alone. With this contention the Department is not prepared to agree. It may be noted that only three points of intersection out of four are

given or mentioned either in the patent or in the field notes of the Northern Light survey, and further, that the parallelism of the side lines of the excluded Grizzly claim is not recited or mentioned. On the contrary, the Department is inclined to the view that the situs of the conflict is established and controlled by the loci of the respective conflicting claims as such claims are fixed and determined by their monuments and lines upon the ground and that it is this conflict that was excepted and excluded from the Northern-Light patent.

Therefore, since it appears in this case that the total area applied for is represented by the sum of certain expressed exclusions of supposed conflicts with the Highland Chief claim, which conflicts it now appears have no existence in fact, it must be held that the areas represented by these theoretical exclusions passed under the patents to the claims referred to and that there now remains no area subject to appropriation within survey No. 5940 of the Emma copper claim.

The decision appealed from is accordingly affirmed.

EDWARD F. MELONY.

Decided March 16, 1916.

SWAMP LANDS—MINNESOTA DRAINAGE LAWS—ACT OF MAY 20, 1908.

Where the highest bidder for unentered lands sold for drainage charges under section 2 of the act of May 20, 1908, fails to consummate his purchase by entry within the time prescribed by the act, a subsequent purchaser of the land under section 6 will be required to pay the unpaid fees, commissions and purchase price to which the United States may then be entitled, the entire sum at which the land was sold at the sale, including any excess over and above the drainage charges, and, where bid in by the State, interest on the amount bid by the State at the rate of seven per cent per annum.

JONES, *First Assistant Secretary:*

Edward F. Melony has appealed from the decision of the Commissioner of the General Land Office rendered June 15, 1915, holding for cancellation his homestead entry 07451, for the SE. $\frac{1}{4}$, Sec. 12, T. 155 N., R. 30 W., 5th P. M., Cass Lake, Minnesota, land district, unless he shall make payment of the excess price bid at the tax sale of said land, sold for taxes under the act of May 20, 1908 (35 Stat., 169), amounting to the sum of \$65.

The act of May 20, 1908, *supra*, authorized the drainage of certain lands in the State of Minnesota, and made said lands subject to all the provisions of the laws of the State relating to the drainage of swamp or overflowed lands. It was provided that all drainage charges legally assessed could be enforced against any unentered lands, or lands covered by an unpatented entry, in the same way in which such charges would be enforced against lands held in private ownership.

Section 6 of said act provides as follows:

That unless the purchasers of unentered lands shall within 90 days after the sale provided for in section 3, pay to the proper receiver the fees, commissions and purchase price to which the United States may be entitled as provided in section 5, and unless the purchasers of entered lands shall within 90 days after the right of redemption has expired make like payments as provided for in this section, any person having the qualifications of a homestead entryman may pay to the proper receiver for not more than one hundred and sixty acres of land for which such payment has not been made: First, the unpaid fees, commissions and purchase price to which the United States may then be entitled; and, second, the sum at which the land was sold at the sale for drainage charges, and in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount at which the land was sold at the sale for drainage charges together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charge, if the land when sold was unentered.

It appears that said above-described tract was bid in for the drainage taxes for 1912, by one Oscar D. Christianson, at the annual tax sale held on May 11, 1914, as provided by section 3 of said act, and that it was an excess bid of \$65. He failed to make application for the land within ninety days after date of sale, as provided by said section 6 of the act, and thereupon the present claimant, Edward F. Melony, made entry by paying to the receiver the proper fees, commissions, drainage charges and taxes, as provided by said section 6.

By the terms of the act said Melony became subrogated to the rights of said Christianson, but he objects to the payment of the excess bid of \$65 made by Christianson. He insists in substance, that the excess bid amounts in reality to an option on the land to be forfeited in case the option is not exercised within ninety days; that to make the *bona fide* purchaser pay the amount of the excess bid will encourage bidding by irresponsible persons, or by locators whose only purpose is to advance the money and hold the land for possible clients.

The Commissioner held that claimant would not be fully subrogated to all the rights of the original purchaser, as provided by said section 6 of the act, unless he paid said excess bid of \$65.

Upon careful examination of the language of said act of May 20, 1908, and of said section 6, the Department is convinced that under the terms of the act any excess bid made at said tax sales must be paid by the subsequent purchaser. He must first pay the unpaid fees, commissions and purchase price to which the United States may then be entitled; also *the sum at which the land was sold at the sale for drainage charges*, and in addition thereto, if bid in by the State,

interest on the amount bid by the State at the rate of seven per centum per annum, before he can be fully subrogated to the rights of the original purchaser and receive a patent for the lands.

In the opinion of the Department the language of the statute can not be fairly construed otherwise, and the action appealed from is accordingly affirmed.

ELETHEA M. ADAIR.

Decided March 17, 1916.

DESERT LAND ENTRY—RECLAMATION—WATER SUPPLY.

The desert land law requires that an entryman thereunder shall reclaim the land embraced in his entry before he is entitled to patent; and the mere fact that the land department recognized as a sufficient source of water supply the water company with which the entryman had a contract for water to irrigate the land, and that the entryman made expenditures on the faith of that recognition, does not warrant the acceptance of final proof upon the entry where it appears that the company's works, as now existing, are insufficient to insure a water supply for the permanent reclamation of the land.

JONES, First Assistant Secretary:

Elethea M. Adair appealed from decision of September 30, 1915, rejecting final proof on her desert-land entry for lots 3 and 4, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 3, T. 6 S., and lots 6 and 7, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 34, T. 5 S., R. 7 E., B. M., Boise, Idaho, on the ground of insufficient proof of water supply.

July 25, 1910, Adair made entry and submitted final proof November 14, 1914, showing the land was embraced in Indian Cove Irrigation District, and her holding of stock certificate for 274.87 shares of capital stock of the irrigation company with contract that the company furnish water sufficient to irrigate the irrigable land in the entry.

The Commissioner knew from his own records that, while this water company had been approved conditionally, June 9, 1913, on findings of the examiner who made investigation in the field, afterwards, May 3, 1915, a mineral inspector reported that the Indian Cove Reclamation Company had contracted to convey to the Indian Cove Irrigation District all its water rights, pumping system, canals, etc., and agreed to assign all water contracts it had made. The Commissioner therefore recalled his former ruling respecting the sufficiency of the water company. The investigation showed that some of the pumping machinery for lifting water to irrigated lands under this canal had been removed to be used in lifting water to another level and the works, as now existing, were insufficient to insure a water supply on this level. He therefore rejected the final proof.

The appeal contends that as the water company was once approved as a source of water supply, and expenditure was made by the claimant in faith of such approval, the final proof should be accepted.

The Department can not uphold such contention. A desert-land entryman undertakes to reclaim the land, and if, before patent issues, it is ascertained that the source of water supply is insufficient, an entry can not be approved and passed to patent. The mere fact that the land department at one time regarded the water company as a sufficient source of water supply does not authorize patent for land that is not in fact permanently reclaimed.

In rejecting the final proof, the Commissioner allowed claimant to apply for relief under act of March 4, 1915 (38 Stat., 1161). This is all the relief to which the party is entitled.

The decision is affirmed.

INSTRUCTIONS.

March 18, 1916.

DESERT LAND ENTRY—SEC. 5, ACT OF MARCH 4, 1915.

Section 5 of the act of March 4, 1915, permits the perfection of certain desert land entries in like manner as homestead entries, but a desert land entry perfected under such act in the manner required of homestead entrymen is not transmuted into a homestead entry, but remains a desert land entry subject to a new kind of proof.

JONES, *First Assistant Secretary*:

I am in receipt of proposed letter to the Comptroller of the Treasury, asking for opinion as to whether those provisions of the act of March 4, 1915 (38 Stat., 1161), which permit of the perfection of certain desert-land entries in the manner required of homestead entrymen, import an adoption of all the provisions of the homestead laws, including such as would require payment of registers and receivers of the fees and commissions which must be paid by homestead entrymen.

I do not deem this a question which need go to the Comptroller for decision. It is one peculiarly within the province of this Department, and the duty of construing the act in question, which was prepared in and recommended by the Department, rests upon us. In fact, as stated in the proposed letter, the regulations issued April 13, 1915 (44 L. D., 56), contain a construction of this question, viz., that a desert-land entry perfected under said act in the manner required of a homestead entryman is not transmuted into a homestead entry, "but remains a desert-land entry, subject to a new kind of proof."

Upon further consideration of the matter as set forth in the proposed letter, the Department adheres to that view. The law of March 4, 1915, *supra*, deals only with desert-land entries and provides a method for their perfection under prescribed conditions. It does not in terms or effect provide for changing any of said entries from one class to the other, but, as stated, simply provides the form and manner by which they may be perfected and title acquired. I therefore do not deem it necessary or advisable to submit the proposed letter to the Comptroller, but advise you [Commissioner of the General Land Office] that the Department adheres to the views set out in the regulations of April 13, 1915.

INSTRUCTIONS.

March 28, 1916.

EQUITABLE ADJUDICATION—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

Where final proof is submitted after the statutory lifetime of an entry, and within two years from the date of the issuance of the receiver's final receipt additional evidence is called for by the land department or contest or adverse proceeding is instituted against the entry, which operates to suspend action upon the entry by the Board of Equitable Adjudication, the proviso to section 7 of the act of March 3, 1891, does not bar consideration by the Board after the expiration of the two year period.

JONES, *First Assistant Secretary*:

I have your [Commissioner of the General Land Office] communication of March 22, 1916, submitting for instructions a list of cases prepared for consideration by the Board of Equitable Adjudication. You ask whether certain of the cases contained therein are properly subject for consideration by the Board.

In the cases mentioned final proofs were submitted after the statutory lifetime of the entries. In every case action was taken, either by your office calling for some additional evidence, or on contest or adverse proceeding against such entry, within two years from the date of the issuance of the receiver's final receipt upon final proof, but a period of more than two years has now elapsed since issuance of final receipt. Therefore, the question presented is whether the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), is operative so as to require issuance of patent in any event independently of consideration by the Board of Equitable Adjudication.

Clearly, these cases could not have been properly submitted to the Board during the pendency of contest or adverse proceeding or, as to some of the cases, prior to the call for additional evidence which you deemed necessary for completion of such case for the

Board's consideration. The status of these cases clearly distinguishes them from the cases mentioned in your memorandum, wherein, under date of April 18, 1914, the Department advised you that the said act of 1891 was operative because no action on the cases there considered had been taken within the two year period.

In the case of F. M. Pliter (38 L. D., 34) it was held:

Proceedings begun within proper time prevent the running of the statute until the suspension on account thereof is formally removed.

Manifestly, these cases were in a state of suspension and could not have been acted upon by the Board while the adverse proceedings were pending. Such consideration at this time does not involve the initiation of any new action against the entries, but will be merely the performance of a duty held in abeyance by the proceedings mentioned.

The rules governing the submission of cases to the Board provide, among other reasons, for consideration of cases wherein final proof has not been made within the statutory lifetime of entry. The Department is of the opinion that the provisions of the act of 1891, *supra*, are not operative in these cases, and that they are subject for consideration by the Board of Equitable Adjudication.

The papers are herewith returned.

HAGENSTEIN v. NORTHERN PACIFIC RY. CO.

Decided March 30, 1916.

NORTHERN PACIFIC SELECTION—GROS VENTRE LANDS—HOMESTEAD APPLICATION.

Where indemnity selection lists by the Northern Pacific Railway Company for lands within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian reservation, restored to the public domain and opened to certain classes of entries by the act of May 1, 1888, were rejected on the ground that such lands were not subject to selection by the company as indemnity, and during the pendency of an appeal by the company from such action the act of March 3, 1911, was passed, declaring such lands a part of the public domain and "open to the operation of laws regulating the entry, sale, or disposal of the same," and the company thereafter filed supplemental lists for the lands theretofore selected, tendering the necessary fees and receiving receipt therefor, the rights of the company thereunder are superior to any rights acquired by the subsequent tender of a homestead application not based upon settlement prior to the filing of the supplemental lists.

JONES, *First Assistant Secretary*:

The Department has considered the motion filed in the above-entitled case by Guss Hagenstein for rehearing of departmental decision of November 5, 1915 [not reported], affirming the decision of

the Commisisoner of the General Land Office, rendered May 20, 1915, rejecting his homestead application 029133, filed June 18, 1914, under the act of February 19, 1909 (35 Stat., 639), for the W. $\frac{1}{2}$, Sec. 35, T. 24 N., R. 53 E., M. M., Glasgow, Montana, land district.

The case was argued orally upon the motion and has been exhaustively considered in the light of contentions of counsel urged in this and allied cases presenting the same question.

It appears that the tract applied for by Hagenstein June 18, 1914, is within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfeet and River Crow Indian Reservation restored to the public domain and opened to certain classes of entries by the act of May 1, 1888 (25 Stat., 113, 133). Plat of survey was filed in the local land office May 3, 1909, and the township designated under the act of February 19, 1909, *supra*, on May 1, 1909. The land is included in coal reserve, Montana No. 1, created by executive order of July 9, 1910.

The described tract lies within the first indemnity limits of the grant to the Northern Pacific Railway Company, and on May 3, 1909, the Company applied to select the same, with other lands, per list No. 5 (Glasgow 04812), and tendered \$198 as fees in connection with such list, for which the receiver issued his official receipt No. 76547, May 6, 1909.

The local officers, following the ruling laid down in the case of *Bradley v. Northern Pacific Railway Company* (37 L. D., 410), that the act of May 1, 1888, *supra*, did not authorize appropriation of land thereunder by railway selection, rejected the selection involved, subject to the right of appeal, and the receiver, in accordance with the regulations then governing (37 L. D., 51, par. 29), returned the fees by his official check on the same date they were paid. From such rejection the railway company appealed to the Commissioner of the General Land Office.

By departmental instructions of March 21, 1910, prior to final action by the Commissioner on the then pending appeal of the railway company, the Commissioner was directed to suspend further action on the appeal pending final decision by the courts in a case wherein the same issue was presented.

While action on the railway selection was thus suspended, Congress passed the act of March 3, 1911 (36 Stat., 1080), which provided as follows:

That section three of the act of May first, eighteen hundred and eighty-eight, ratifying and confirming an agreement with the various tribes or bands of Indians residing upon the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservations, in Montana Territory, be, and the same is hereby, amended so as to read as follows:

"SEC. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States

and are open to the operation of laws regulating the entry, sale, or disposal of the same: *Provided*, That no patent shall be denied to entries heretofore made in good faith under any of the laws regulating entry, sale, or disposal of public lands, if said entries are in other respects regular and the laws relating thereto have been complied with."

October 3, 1913, the Commissioner returned the list to the local officers with direction that the same be allowed:

as to such tracts embraced in said lists, as your records, upon receipt hereof, show to be free from other claims, subject to such further examination as may be found proper by this office.

You will require the company to file separate lists for the clear tracts and for those for which other claims have been asserted, should the company desire to prosecute its claim to the latter. If the company files the lists indicated, they should be numbered list No. 5, supplemental "A" and supplemental "B," and should be given the old serial No. 04812.

Pursuant to these instructions, supplemental lists "A" and "B" were prepared and filed, and on December 19, 1913, the railway company tendered the necessary fees, and on said date the receiver issued his official receipt therefor.

In so far as the question of the legality of procedure with respect to the preparation of the supplemental lists is concerned, it being urged on behalf of Hagenstein that contrary to instructions they were prepared by the local officers, no evidence appears of record to support the contention that the procedure, as directed by the Commissioner's letter of October 3, 1913, requiring the railway company to prepare the supplemental lists, was not followed. Moreover, this issue is immaterial, in view of the fact that the lists, however prepared, were tendered by the company with the requisite fees.

It remains to be determined what rights, if any, as against the company, Hagenstein acquired in the premises under his homestead application, filed June 18, 1914, not based upon any alleged prior settlement.

Hagenstein was not, on June 18, 1914, claiming by settlement or otherwise prior to the filing of the supplemental lists and the date of payment of fees by the railway company December 19, 1913. Under the circumstances Hagenstein acquired no right as against the railway company by the mere tender of a homestead application at a date subsequent to the filing of the supplemental lists and payment of the fees by the company in connection therewith. Whatever the merits of its claim theretofore asserted, the company had, from and after December 19, 1913, a pending selection of the land in controversy, and so long as that selection remains of record no other application can be allowed, nor can any rights be initiated by the tender thereof. (See *Porter v. Landrum*, 31 L. D., 352, 353; *Southern Pacific Railroad Co.*, 32 L. D., 51, 53; *Santa Fe Pacific Railroad Co.*, 33 L. D., 161; *Santa Fe Pacific R. R. Co. v. State of California*, 34 L. D., 12.)

It is asserted on behalf of claimant that he has acquired equities in the premises, as a settler, by virtue of having placed improvements on the tract applied for. Hagenstein received actual notice that his homestead application was rejected by the local officers, and if he subsequently placed improvements on the land he did so without authority of law, and in no way impaired any prior legal claim of the company under its selection.

Departmental decision of November 5, 1915, rejecting Hagenstein's homestead application for conflict with the prior pending railway selection is adhered to and the motion for rehearing accordingly denied.

SILAS A. FRY.

Decided March 30, 1916.

ENLARGED HOMESTEAD ENTRY—ADDITIONAL.

Where entry for eighty acres was made under the enlarged homestead act as additional to an original homestead entry for 160 acres, and final proof was submitted and patent issued upon the original and additional entries as one entry, the entryman may be permitted to make a further entry for eighty acres under section 3 of the enlarged homestead act as amended by the act of March 3, 1915, as additional to his combined entry, where the land so taken was not subject to entry at the date he made his first additional entry.

JONES, *First Assistant Secretary:*

April 7, 1909, Silas A. Fry made homestead entry 017378, at Roswell, New Mexico, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 24, T. 1 N., R. 28 E., N. M. P. M., containing 160 acres, now Fort Sumner land district.

The lands in this township were designated as open to entry under the enlarged homestead laws May 1, 1909. July 10, 1909, Fry made additional entry 019211 for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said Sec. 24, containing 80 acres. Final proof was made upon the original and additional entry May 9, 1913, final certificate (Fort Sumner 06164-06728) being issued June 10, 1913, and patent, December 2, 1913.

July 2, 1915, Fry filed application 012744, at Fort Sumner, New Mexico, to enter the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said Sec. 24, containing 80 acres, as additional "to my homestead entry No. 06164-06728, . . . for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Section 24," in which he stated that he still owned and occupied the land described in his original and additional entry. His application was rejected by the register and receiver for the stated reason that he was not qualified to make such an entry, being a second additional entry, under the enlarged homestead act and the act of March 3, 1915 (38 Stat., 956). This decision was affirmed by the Commissioner of the General Land Office

in a decision dated January 7, 1916, the Commissioner holding that by the exercise of his right to make an additional entry under the enlarged homestead act, although the entry did not cover the full amount allowed by the act, Fry had exhausted his right thereunder, without, however, citing any authority for the ruling. Fry has appealed to the Department.

The records of the General Land Office disclose that the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 24, embraced in the application now under consideration, was originally entered November 26, 1906, by Fred Atkinson under homestead entry 10232, Roswell, New Mexico. Atkinson made commutation proof March 16, 1908, upon which cash certificate 2014 (serial No. 01040) issued March 24, 1908. Atkinson's entry was patented November 16, 1908, the patent being set aside by a decree of the Federal court, June 17, 1913, the land being ordered restored to entry by the Commissioner's instructions of March 5, 1915.

Section 3 of the act of March 3, 1915, *supra*, provides in part:

That any person who has made, or shall make, homestead entry of lands of the character herein described, . . . shall have the right to enter public lands, subject to the provisions of this act, contiguous to his first entry, which shall not, together with the original entry, exceed 320 acres: *Provided*, That the land originally entered and that covered by the additional entry shall have first been designated as subject to this act, as provided by section 1 thereof.

In Loring R. Reynolds (39 L. D., 36), it was held that one who makes additional entry for less than the area he is entitled to take under section 3 of the enlarged homestead act of February 19, 1909, may be permitted to enlarge his entry, where it is clearly shown that he did not thereby intend to exhaust his right and took prompt action looking to amendment of the entry by the addition of adjoining land. The Department there stated at page 37:

The act under consideration is, in some respects, similar to the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act, and the rules applied under that act in cases of amendment or enlargement of entries thereunder should be considered in adjudicating such applications under the enlarged homestead act. In the case of James Dinan (35 L. D., 102) it was held that (syllabus):

"An entryman under the act of April 28, 1904, who fails to take the full quantity of land he is entitled to enter, for the reason that there are at that time no other adjoining unappropriated public lands subject to entry, may, if other adjoining lands subsequently become vacant, enlarge his former entry to the full area permitted by the statute, by including contiguous tracts in and as a part thereof, regardless of whether at the time of his original entry he contemplated taking those particular tracts if they should subsequently become vacant, provided it be satisfactorily established that he did not at the time of making the original entry intend thereby to exhaust the right conferred by the statute."

In the present case the land now applied for by Fry was not subject to entry at the time of making his original and first additional entry by reason of the fact that it was covered by the outstanding patented entry of Atkinson. This patent was later set aside and the land became open to entry in March, 1915, and Fry filed his present application with proper promptness. Further, he made one final proof upon both his original and first additional entry which were embraced in one final certificate and upon which one patent has issued. They may well be taken therefore as constituting but one entry and the technical objection (even if sound) made by the Commissioner does not arise.

The decision of the Commissioner is accordingly reversed and the application will be allowed in the absence of other objection.

INSTRUCTIONS.

February 1, 1916.

RECLAMATION ASSIGNMENTS—ACT OF JUNE 23, 1910—MINORS.

Minors are not qualified to take by assignment under the act of June 23, 1910, farm units upon which reclamation charges have not been paid in full.

SWEENEY, Assistant Secretary:

I am in receipt of proposed communication from you [Commissioner of the General Land Office] to the Chief Counsel of the Reclamation Service, answering questions as to the right of minors to take farm units in reclamation projects by assignment under the act of June 23, 1910 (36 Stat., 592).

In my opinion, your proposed opinion should not be approved or given, for the reason that the acquisition of rights under the reclamation act of June 17, 1902 (32 Stat., 388), and acts supplemental thereto, involve the possession by water-right applicants of not only qualifications to perform physical acts with respect to the lands and waters involved, but necessarily require that water-right applicants and assignees of unperfected claims and rights under the reclamation law shall have the legal status and ability to fulfill the requirements imposed by the law.

As at present advised, I do not see how a person who possesses the legal status of a minor can legally or in a binding way undertake to perform the conditions imposed by the reclamation law, or in any event to obligate himself so to do.

While it is true that the Department held that an assignee under the act of June 23, 1910, *supra*, is not required to perform the conditions of residence, cultivation, and improvement under the homestead laws, and need not himself be qualified to make a homestead entry,

or in certain cases a married woman may take an assignment thereunder, these opinions do not involve persons whose status is such that they are legally unable to assume and perform the obligations imposed by the reclamation laws.

In view of the foregoing, I am of the opinion that if it be necessary at this time to render decision upon the point involved that the holding should be to the effect that minors are not qualified to take by assignment farm units upon which reclamation charges have not been paid in full.

INSTRUCTIONS.

April 3, 1916.

RECLAMATION—REINSTATEMENT OF WATER-RIGHT APPLICATION.

Where a water-right application for land held in private ownership has been canceled for default in payment of building, operation, and maintenance charges, such application may be reinstated upon full payment of all accrued charges.

JONES, First Assistant Secretary:

I am in receipt of your [Director of the Reclamation Service] letter of March 17, 1916 (R. S., 41), recommending that the water-right application of Mirene Domingues for lots 8, 17 and 18, block C, East Addition, San Jose, in Sec. 7, T. 22 S., R. 27 E., N. M., P. M., Carlsbad project, Roswell 022048, New México, be reinstated.

The above water-right application, being for lands held in private ownership, was originally filed by Jose Bustamante, March 14, 1910, it being stated therein that the applicant agreed that, upon failure to comply with the terms of the reclamation act and the regulations thereunder, the application should be subject to cancellation by the Secretary of the Interior with the forfeiture of all rights acquired thereunder and of all payments thereon. The application was assigned to Domingues January 9, 1914, and was ordered canceled by the Department August 9, 1915, for failure to pay accrued building, operation, and maintenance charges. Domingues has now fully paid all accrued charges.

Paragraph 101 of the regulations of February 6, 1913, provides that in case of default of payment in cases other than those of reclamation homestead entrymen, the matter should be reported to the Secretary of the Interior with recommendation for appropriate action by suit to recover the amount due and also, if such action is deemed advisable, for the cancellation of the water-right application. Section 5 of the act of June 17, 1902 (32 Stat., 388), provided that a failure to make any two payments when due should render a homestead entry made under that act subject to cancellation with the for-

feiture of all rights, as well as any moneys already paid thereon. In the case of Marquis D. Linsea (41 L. D., 86), it was held that where a homestead entry had been canceled for default in payments, the Secretary of the Interior could, in the absence of any adverse claim, authorize its reinstatement with a view to permitting the entryman to cure his default.

The principle announced in the case of Marquis D. Linsea, *supra*, may well be applied to water-right applications for lands held in private ownership, and in view of the fact that all accrued charges have now been paid, you are authorized to reinstate the water-right application of Domingues.

GEORGE A. ARMSTRONG.

April 4, 1916.

DESERT LAND ENTRIES IN CHUCKAWALLA VALLEY—ANNUAL AND FINAL PROOFS.

In determining when annual and final proofs become due in connection with desert land entries embracing lands in the Chuckawalla Valley in the State of California described in the acts of June 7, 1912, and March 4, 1913, the period between June 7, 1912, and May 1, 1915, should be excluded and the statutory period of the entry extended accordingly.

First Assistant Secretary Jones to George A. Armstrong, 642 North El Molino Avenue, Pasadena, California.

Reference is had to your letter of February 12, 1916, in which you request to be informed as to the date when final proof becomes due in connection with your desert land entry 012711, Los Angeles, California, land district, made May 27, 1912, under an application filed April 5, 1911, for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 29, T. 7 S., R. 22 E., S. B. M., containing 120 acres, situated in Riverside County, California.

In reply, you are informed that the records of the General Land Office show that on January 15, 1912, you made first annual proof, alleging the expenditure of \$120 in the first clearing of 15 acres of said land, and that on June 6, 1913, you made second and third annual proofs, alleging the expenditure of \$240 in the first clearing of about 40 acres of said land.

The act of June 7, 1912 (37 Stat., 130), provided that no desert land entry theretofore made in good faith under the public land laws, for lands in Tp. 7 S., R. 22 E., S. B. M., California, and in other described townships, should be canceled for failure on the part of the entryman to make any annual or final proof falling due upon any such entry prior to May 1, 1913.

The act of March 4, 1913 (37 Stat., 1008), provides that no desert land entry theretofore made in good faith, under the public land

laws of the United States, for lands in Tp. 7 S., R. 22 E., S. B. M., California, and in other described townships, shall be canceled, prior to May 1, 1916, because of failure on the part of the entryman to make any annual or final proof falling due upon any such entry prior to May 1, 1915.

There is now pending in Congress H. R. Bill 9052, which provides that no desert land entry made in good faith for certain described lands in Riverside County, California, omitting your lands, shall be canceled prior to May 1, 1922, because of failure on the part of the entrymen to make any annual or final proof falling due on any such entry prior to that date.

The statutory period within which final proof must be submitted in connection with your entry began to run from the date of the allowance of the entry, May 7, 1912, and continued until the approval of the act of June 7, 1912, *supra*. Under the terms of the act of June 7, 1912; and of the act of March 4, 1913, the period between June 7, 1912, and May 1, 1915, should be eliminated, and the statutory period of the entry extended for that period.

Accordingly, the statutory period of four years within which final proof must be submitted on your entry will not expire until April 1, 1919; and, as you have already submitted three annual proofs, your entry will not be subject to cancellation for failure to comply with the desert land laws, until April 1, 1919.

The rule to be observed in determining when annual and final proofs become due in connection with desert land entries covering lands described in the act of June 7, 1912, and in the act of March 4, 1913, is to exclude the period from June 7, 1912, to May 1, 1915, and to extend the statutory period of the entry accordingly.

CENTRAL PACIFIC RY. CO.

Decided April 7, 1916.

CHARACTER OF LAND—SURVEYOR-GENERAL'S RETURN.

The return of the surveyor-general as to the character of land constitutes but a small element of consideration when the question as to the character of the land is at issue.

RAILROAD GRANT—CHARACTER OF LAND—BURDEN OF PROOF.

When the character of land selected by a railroad company is put in issue, the burden is on the company to show by clear and convincing evidence that the land is of a character subject to the grant.

RAILROAD GRANT—MINERAL LAND.

To except lands from a railroad grant as mineral in character it is not necessary that a discovery of mineral be shown such as would serve as a basis for mineral patent; but it is sufficient if the land be shown to have a *prima facie* mineral character and a prospective value for mineral greater than any other known value.

JONES, *First Assistant Secretary*:

This is an appeal by the Central Pacific Railway Company from a decision of the Commissioner of the General Land Office dated December 15, 1915, holding for rejection railroad list No. 9, serial 01223, filed under the act of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), as to the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 29, T. 20 N., R. 20 E., M. D. M., Carson City land district, Nevada.

Proceedings against the selection are based upon the report of a special agent, in which it was charged that the lands are mineral in character. After hearing duly had, the local officers found and held that the charge had been sustained, and upon appeal the Commissioner affirmed that decision. Further appeal brings the matter before the Department for consideration.

It is urged in the appeal that the surveyor-general's return has impressed the lands with a *prima facie* nonmineral character and that the burden of proof was therefore upon the Government to overcome this return. Attention is also directed in the appeal to that portion of the Commissioner's decision wherein it is held that there has been no such discovery of mineral shown as would be necessary to satisfy the requirements of the law in that respect in order to perfect a mining location, and that the evidence neither proves nor disproves that the land contains valuable mineral deposits.

As to the first contention, it may be stated that the return of the surveyor-general as to the character of land constitutes but a small element of consideration when the question as to the true character of the land is at issue. *Aspen Consolidated Mining Co. v. Williams* (27 L. D., 1); *Instructions* (31 L. D., 212); *Kinkade v. State of California* (39 L. D., 491). See also, in this connection, case of *Central Pacific Ry. Co.* (43 L. D., 545), in which it was held that when the character of land selected by the railway company is put in issue, the burden is on the company to show by clear and convincing evidence that the land is of a character subject to the grant.

As to appellant's second contention, it may be said that a showing may be presented which is sufficient to warrant the classification of land as mineral in the broader sense of that term, but which would be insufficient as a basis for mineral patent. In the case of *Bell v. Parker*, unreported, decided by the Department December 18, 1912, where certain mining claims for which application for patent had been made covered an area alleged to be agricultural in character, the Department said:

While it cannot be held from the testimony presented that discovery of a vein or lode of mineral-bearing rock in place has been made upon any of the claims, except on Tyrone No. 2, the showing presented amply justifies the conclusion that the land here involved is mineral in character and not subject to disposition under the agricultural land laws.

In the decision complained of, the Commissioner found and held as follows:

The preponderance of the evidence, considering the number of witnesses, their acquaintance with the land, their experience as miners and prospectors, the indications of mineral on or near the land as testified to by them, establishes that the land has a *prima facie* mineral character, having a prospective value for mineral, which is greater than any other value that the land is known to have.

After a careful review of the testimony, the Department finds that this conclusion is amply justified. The decision appealed from is therefore hereby affirmed.

CENTRAL PACIFIC RY. CO.

Motion for rehearing of departmental decision of April 7, 1916, 45 L. D., 25, denied by First Assistant Secretary Jones May 16, 1916.

INSTRUCTIONS.

April 10, 1916.

ENLARGED HOMESTEAD—DESIGNATION—RIGHT OF WAY.

The approval of a right of way under the act of March 3, 1891, does not of itself prevent a designation of the land on application for enlarged homestead entry under the act of March 4, 1915; and where it appears that the applicant for entry will be able to comply with the requirement of section 4 of the enlarged homestead act as to the area to be cultivated, taking the entire area embraced in the application into consideration, notwithstanding the whole or part of certain legal subdivisions may be subject to a right of way for an irrigation reservoir, the entire area may be designated; but if it appear that it will be impossible for the applicant to comply with the requirements as to cultivation, the legal subdivisions subject to the right of way rendering such compliance impossible should be excluded from the designation.

JONES, *First Assistant Secretary*:

I am in receipt of your [Director of the Geological Survey] letter of March 15, 1916, requesting instructions as to applications for the designation under the enlarged homestead act of lands containing legal subdivisions lying wholly or in part within the flowage line of reservoir sites, for which easement has been granted under act of March 3, 1891 (26 Stat., 1095), or for which right of way has been acquired by construction. Your letter, in part, states as follows:

When only a comparatively small portion of a legal subdivision is flooded and is thereby to that extent rendered unfit for agricultural purposes, the remainder being of a character contemplated by the provisions of the enlarged

homestead act as being subject to designation, the practice has been to recommend such subdivision for designation.

Where, however, an entire legal subdivision listed in an application for designation is situated within the flowage from a reservoir for which easement has been granted and the land is periodically flooded, *it would appear that the department is without jurisdiction over it.* In consequence an application subsequently filed, involving the same tract, could not properly be approved.

From your letter I infer that the applications for designation are those filed under the act of March 4, 1915 (38 Stat., 1162), which further requires that the applicant must file in the proper local office his application to enter the land, accompanied by a proper showing as to its character, together with the regular fees and commissions.

The act of March 3, 1891 (26 Stat., 1095), in section 18, grants a right of way through the public lands and reservations of the United States to a canal or ditch company formed for the purpose of irrigation—

to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof.

Section 19 requires the filing of a map of the canal or ditch and reservoir within certain periods of time, and then provides that—upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way.

Under section 21, the canal or ditch company is authorized to occupy the right of way solely for the purpose of a canal or ditch, in so far as it may be necessary for their construction, maintenance and care.

From the above, it is clear that the act of March 3, 1891, grants merely an easement, and does not affect the fee, which is still left in the United States. The act distinctly provides that lands over which rights of way have been granted shall be disposed of subject to the right of way. Your statement that the Department has lost jurisdiction over such lands is not entirely accurate, and is in conflict with the decision of this Department in *Homer E. Brayton* (31 L. D., 364), wherein it was held that the approval of a map of a right of way for a canal, ditch, or reservoir, under the act of March 3, 1891, does not vest in the applicant the title to the land covered by such right, and the land may, thereafter, be disposed of by the Government, subject to such right of way.

The approval of the right of way, therefore, does not prevent, in itself, a designation of the land under the act of March 4, 1915, *supra*. Section 4 of the enlarged homestead act, of February 19, 1909 (35 Stat., 639), as amended, requires that the entryman ultimately cultivate one-eighth of the area embraced in his entry.

Should the application before you disclose that the applicant for entry will be able to comply with the requirement as to cultivation, taking the entire area embraced in his application into consideration, notwithstanding that the whole, or part, of certain legal subdivisions, may be subject to a right of way for an irrigation reservoir, the entire area may be designated. If the facts surrounding the application, however, disclose that it would be impossible for the applicant for entry to comply with the requirements as to cultivation, the legal subdivisions subject to the right of way rendering such compliance impossible should be excluded from the designation.

SAN FRANCISCO COLLATERAL LOAN BANK.

Decided April 10, 1916.

REPAYMENT—DEPOSITS FOR SURVEYS.

Claims for moneys deposited by individuals to cover the cost of surveys in accordance with the provisions of sections 2401 and 2402, Revised Statutes, are not subject to assignment, and the depositors only are entitled to any repayment of moneys so deposited.

JONES, *First Assistant Secretary:*

The San Francisco Collateral Loan Bank, which, as assignee of the triplicate deposit certificates mentioned below had applied for a refund of the several sums covered by such certificates, has appealed from the decision of the Commissioner of the General Land Office denying repayment on the grounds that the law provides for a refund in any event only "to the depositors, respectively," and that any assignment of such claims for repayment is specifically prohibited by section 3477, Revised Statutes.

The deposits involved were made in the years 1885 and 1886, with the Assistant Treasurer of the United States, at San Francisco, by various settlers, for the survey of certain designated townships in California, pursuant to the provisions of section 2401, Revised Statutes. The following are the certificates here involved:

No. 183, J. W. Martin, T. 22 S., R. 12 E., M. D. M. Cal., 12/23/85.....	\$200. 00
No. 184, J. W. Martin, T. 22 S., R. 12 E., M. D. M. Cal., 12/23/85.....	200. 00
No. 192, Wm. Doyle, T. 25 S., R. 10 E., M. D. M. Cal., 12/26/85.....	100. 00
No. 215, Peter J. Hogan, T. 24 N., R. 17 W., M. D. M. Cal., 1/30/86.....	45. 00
No. 216, Henry T. Balwin, T. 24 N., R. 16 W., M. D. M. Cal., 1/30/86.....	11. 01
No. 217, James Emery, T. 15 N., R. 11 W., M. D. M. Cal., 1/30/86.....	49. 00
No. 218, Jane Clements, T. 22 N., R. 15 W., M. D. M. Cal., 1/30/86.....	30. 00
No. 219, M. A. Burns, T. 22 N., R. 14 W., M. D. M. Cal., 1/30/86.....	43. 00
No. 220, John Burke, T. 24 N., R. 12 W., M. D. M. Cal., 1/30/86.....	31. 00
No. 221, C. H. Viles, T. 20 N., R. 12 W., M. D. M. Cal., 1/30/86.....	70. 00
No. 222, H. Mahlman, T. 22 N., R. 17 W., M. D. M. Cal., 1/30/86.....	115. 00
No. 223, W. H. Cleary, T. 21 N., R. 15 W., M. D. M. Cal., 1/30/86.....	86. 00
No. 224, Peter Merle, T. 24 N., R. 15 W., M. D. M. Cal., 1/30/86.....	137. 00

The certificates were endorsed in blank and have come into the possession of the applicant bank. Claiming that no portion of the deposits were used in making the surveys of the respective townships, the bank has presented the certificates for surrender and has applied for the refund of the deposits evidenced thereby.

The surveyor-general of California, in his letter of August 6, 1914, stated that the records in his office indicated that the deposits were made but reported adversely to the application for repayment. The Commissioner of the General Land Office, in his decision of August 24, 1914, recited that the records of his office showed that no part of the moneys covered by these certificates were used in connection with the surveys of the townships involved.

The following are the statutes applicable in this matter:

Section 2402, Revised Statutes, which is derived from the resolution of July 1, 1864 (13 Stat., 414), reads as follows:

The deposit of money in a proper United States depository, under the provisions of the preceding section, shall be deemed an appropriation of the sums so deposited for the objects contemplated by that section, and the Secretary of the Treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriations for the surveying service; but any excesses in such sums over and above the actual cost of the surveys, comprising all expenses incident thereto, for which they were severally deposited, shall be repaid to the depositors, respectively.

Section 3689, Revised Statutes, is in part as follows:

There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively, and such appropriations shall be deemed permanent annual appropriations.

* * * * *

Deposits by individuals for surveying public lands:

Of the amount deposited by individuals under the provisions of title "The Public Lands," to pay the cost and expenses incident to the survey of lands, not mineral or reserved, upon which they have settled, any excess of the sums so deposited, over and above the actual cost of surveys, comprising all expenses incident thereto, for which they were severally deposited, to be repaid to the depositors, respectively.

Originally section 2403, Revised Statutes (taken from the act of March 3, 1871, 16 Stat., 581), provided that the amount deposited by settlers should go in part payment for their lands situated in the townships, the surveying of which was paid for out of such deposits. By the act of March 3, 1879 (20 Stat., 352), this section was amended so as to read:

Where settlers make deposits in accordance with the provisions of section twenty-four hundred and one, the amounts so deposited shall go in part payment for their lands situated in the townships, the surveying of which is paid for out of such deposits; or the certificates issued for such deposits may be assigned by indorsement, and be received in payment for any public lands of the United States entered by settlers under the preemption and homestead laws of the United States, and not otherwise.

The act of August 7, 1882 (22 Stat., 327), contains the following:

Provided further, that no certificate issued for a deposit of money for the survey of lands under section twenty-four hundred and three of the Revised Statutes, and the act approved March third, eighteen hundred and seventy-nine, amendatory thereof, shall be received in payment for lands except at the land office in which the lands surveyed for which the deposit was made are subject to entry, and not elsewhere; but this section shall not be held to impair, prejudice, or affect in any manner certificates issued or deposits and contracts made under the provisions of said act prior to the passage of this act.

The foregoing constituted the applicable provisions of the statutes in effect at the time these deposits were made and received. Said section 2403, Revised Statutes, was amended by the later act of August 20, 1894 (28 Stat., 423), so as to provide that such certificates—

may be received by the Government in payment for any public lands of the United States in the States where the surveys were made, entered or to be entered under the laws thereof.

Section 3477, Revised Statutes, in substance provides that all transfers and assignments of any claim upon the United States shall be absolutely null and void unless made after the allowance of such claim, the ascertainment of the amount due and the issuance of a warrant for the payment thereof.

The Commissioner on August 24, 1914, held that under the law the applicant was not entitled to a refund of these deposits, but that the certificates were available under the act of August 7, 1882, *supra*, for the full amount of such deposits for the reason that no portion of the same had been paid to the original depositors.

The applicant upon appeal contends that the Commissioner's conclusion denying a refund is in error, and that in any event repayment is warranted under section 2 of the act of March 26, 1908 (35 Stat., 48), which is as follows:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representative.

This case being an important one and presenting novel questions which had not theretofore been decided, the record was on December 3, 1914, submitted to the Comptroller of the Treasury for his consideration with a request for an opinion. That opinion was rendered December 14, 1914 (21 Comp. Dec., 386), and the conclusion reached was adverse to repayment. In the course of his opinion the Comptroller said:

While the fund arising from these deposits has frequently been designated as a "trust fund," that is a misnomer. It is a "special fund" and has always

been so regarded, though not so denominated. (For a distinction between trust funds and special funds see 14 Comp. Dec., 361, and 45 MS. Comp. Dec., 1929, June 13, 1908.)

That these deposits do not constitute a trust fund is evidenced by the fact that the Secretary of the Treasury was expressly authorized to place them "to the credit of the proper appropriations for the surveying service," thereby making them available for public expenditures. This is further evidenced by the provision in section 3689, Revised Statutes. . . .

When a settler makes a deposit under the provisions of the above laws he relinquishes all right, title, and interest in the particular moneys deposited and acquires in return therefor the right to have the township surveyed at Government expense and the right to file a claim for the amount of any excess of the deposit over and above the cost to the Government of the survey, including all expenses incident thereto. The claim for this excess is not a charge against the moneys deposited, but a claim against the United States payable out of the appropriation made under authority of section 3689, Revised Statutes, *supra*. The certificate of deposit does not fix the amount of the settler's claim for refund. It is not even *prima facie* evidence that he has a valid claim. His right to a refund can be determined only after an examination of the records as to the expenses actually incurred by the Government incident to the making of the survey on account of which the deposit was made, and when the amount due on the claim is determined it is payable from funds appropriated by Congress for that purpose as above set forth. In view of these facts it must be held that these claims for repayment of the excess of deposits are claims "upon the United States" within the meaning of the provisions of section 3477, Revised Statutes, declaring null and void all transfers and assignments of such claims unless made and executed in the manner therein provided and after allowance, ascertainment of amount due, and issuance of warrant.

In so far as the interests of the depositor are concerned it is immaterial from what fund the Government pays for the surveying on account of which the deposit was made or for what purpose the Government uses the moneys deposited.

None of the original depositors to whom the certificates now under consideration were issued would have any valid claim for refundment unless the amount of his deposit exceeded the cost of survey, including all expenses incident thereto; and the transfer or assignment of such claims as said depositors might have is prohibited, as hereinbefore stated. . . .

This is the construction uniformly placed on this provision by the officers charged with its administration. (See particularly paragraphs 29 and 33 of the circular of June 24, 1885, 3 L. D., 599, in effect at the time these deposits were made.)

Section 2 of the act of March 26, 1908 (35 Stat., 48), has no application to this case.

The question submitted is answered in the negative.

In view of the reasons advanced and the conclusion reached by the Comptroller, there remains but little to be said. The Department is of the opinion that section 2 of the act of March 26, 1908, *supra*, can have no application in this matter. These survey deposits are authorized and controlled by particular and specific statutes applicable to them only. Said act of March 26, 1908, in section 1, pro-

vides for the repayment of purchase moneys and commissions paid under any public land laws, under any application to make any filing, location, selection, entry, or proof, where the application, entry or proof has been rejected and where there is no fraud or attempted fraud. Section 2 prescribes that repayment of excess moneys may be made where any payments to the United States under the public land laws in excess of the amount lawfully required have been made. Section 3 declares that the Commissioner shall ascertain the amount of any "excess moneys, purchase moneys, or commissions," and that the Secretary shall at once certify such amounts to the Secretary of the Treasury for payment. The excess moneys contemplated by sections 2 and 3 are obviously moneys of the same class as those for which repayment is provided in section 1, that is to say, excess amounts of any moneys paid in connection with any application to make any filings, etc. It follows that this act has no application to these survey deposits.

The judgment of the Commissioner denying repayment is correct and is hereby affirmed.

PETITIONS FOR DESIGNATION UNDER ENLARGED HOMESTEAD ACT.

INSTRUCTIONS.

[No. 469.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 11, 1916.

REGISTERS AND RECEIVERS,

United States Land Offices, Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

SIRS: Paragraph 6 of the instructions of April 17, 1915 (44 L. D., 68), under the act of March 4, 1915 (38 Stat., 1162), is hereby amended so as to read as follows:

6. Where designation is made of all the land involved you will, when it becomes effective, place the entry of record.

Where the Geological Survey advises this office that it is unable to classify the land, or some part thereof, as subject to designation, this office will, through the proper local land office, furnish the applicant with a copy of the Survey's report, and will allow him thirty days within which to file response. At the applicant's option, he may either appeal from the finding to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the

facts, accompanied by such evidence as is desired, tending to disprove the adverse conclusion reached by the Survey.

Such appeal or response, if filed, will be forwarded by you to this office, whence it will be transmitted to the Geological Survey for further consideration. That bureau will consider the evidence submitted and, if it warrants such action, will recommend designation of the land; or, if its conclusion be still adverse, will transmit the record to the Secretary with report. The case will thereafter be considered as having the status of an appeal pending before the Secretary's office.

In cases where the applicant fails to furnish a showing, or to appeal from the order of this office requiring him to furnish it, within the thirty days limited, or where the Secretary refuses designation, final action will be taken, and the case closed, by this office, on the basis of the designations which may have been theretofore made.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, April 11, 1916:

ANDRIEUS A. JONES,
First Assistant Secretary.

SHREFFLER v. SMELCER.

Decided April 12, 1916.

ENLARGED HOMESTEAD—CONFLICTING APPLICATIONS.

An application to make second entry filed under the enlarged homestead act for undesignated land and showing *prima facie* that the land is subject to entry under said act, which application is suspended to allow the applicant to file petition for designation and to furnish evidence of his qualifications to make second entry, segregates the land during the period of suspension against a subsequently filed application.

JONES, *First Assistant Secretary:*

Benjamin F. Smelcer appealed from decision of November 30, 1915, involving conflict in part between his application under the enlarged homestead act of February 19, 1909 (35 Stat., 639), and one made by Ferdanand Shreffler under the sixth section of the act of March 2, 1889 (25 Stat., 854).

The facts are that at 10 a. m. on May 15, 1915, Smelcer applied to make entry under the enlarged homestead act for lots 2, 3, and 4, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 1, T. 11 S., R. 44 E., and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 35, T. 10 S., R. 44 E., containing 319.64 acres, La Grande, Oregon.

At the time the above application was filed, the land in Sec. 35 was subject to entry, but that in Sec. 1 had not been designated. The local officers suspended said application pending the filing by Smelcer of a petition for designation of the land in Sec. 1 under the enlarged homestead act and also a showing as to his qualifications to make second homestead entry under the act of September 5, 1914 (38 Stat., 712). At 10:30 a. m. on the same day, May 15, 1915, Shreffler applied to make homestead entry under Sec. 2289, Revised Statutes, for lot 3 and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 1, T. 11 S., R. 44 E., containing 119.88 acres, as an additional entry under the act of March 2, 1889, he having perfected an entry for 40 acres. The local officers allowed the application.

At 12 o'clock on the same day, May 15, 1915, Smelcer filed petition for designation of the land in Sec. 1 under the enlarged homestead act, and on May 25, 1915, a showing as to his qualifications to make second homestead entry.

It appears from a report of the local officers that, owing to the large number of persons in their office who had to be served on the morning in question, the conflict between the applications of Smelcer and Shreffler was not discovered until the time came for putting said applications of record. At that time Shreffler had left the office, and attempt was at once made to find him for the purpose of calling his attention to the conflict. The attempt was not immediately successful, but after the lunch hour he was found and brought to the office, where the circumstances of the mistake were explained to him. He was told that his application would have to be suspended, owing to Smelcer's prior application which segregated the land, and that, in the event of the denial of Smelcer's application, that of Shreffler would then be allowed in the absence of other objection. The latter, however, was unwilling to accept this view of the situation, and he appealed to the General Land Office, where Smelcer's application as to the land in conflict was held for rejection, and that of Shreffler for allowance.

It is provided in the enlarged homestead act of February 19, 1909, similar language being used in the amendatory act of June 13, 1912 (37 Stat., 132), "that no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply."

The act of March 4, 1915 (38 Stat., 1162), amendatory of the act of February 19, 1909, provides:

That where any person qualified to make entry under the provisions of the Act of February nineteenth, nineteen hundred and nine, and Acts amendatory thereof and supplemental thereto, shall make application to enter under the

provisions of said Acts any unappropriated public land in any State affected thereby which has not been designated as subject to entry under the Act (provided said application is accompanied and supported by properly corroborated affidavit of the applicant in duplicate, showing prima facie that the land applied for is of the character contemplated by said Acts), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located, and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character; that during such suspension the land described in said application shall be segregated by the said register and receiver and not subject to entry until the case is disposed of; and if it shall be determined that such land is of the character contemplated by the said Acts, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.

In Smelcer's application and affidavit to enter the land above described under the act of February 19, 1909, filed at 10 a. m. on May 15, 1915, it was stated among other things, that he had previously made entry under the homestead laws which he relinquished without compensation. It was also stated that said lands were "not susceptible of successful irrigation at a reasonable cost from any known source of water supply." These statements were duly corroborated by the affidavit of two witnesses. A *prima facie* showing was thus made that the lands applied for by Smelcer were subject to entry under the enlarged homestead act. So that while the showing made was not literally in accordance with the requirements of the act of March 4, 1915, it was nevertheless sufficient to entitle him to the right to have his application accepted and suspended for the purpose of curing defects therein by way of amendment. The record shows that within two hours from the time he applied to enter the land in question he filed a formal "petition for designation" of said land under the enlarged homestead act and within a reasonably short time thereafter a showing as to his qualifications to make second homestead entry. The land in Sec. 1 was designated September 16, 1915, as being subject to entry under the enlarged homestead act, the designation becoming effective November 10, 1915.

The instructions of April 17, 1915 (44 L. D., 68), issued under the act of March 4, 1915, allowing preference right of entry to a person on whose petition land is designated under the enlarged homestead act, provides, among other things:

In every case where there is now pending an application for original or additional entry under the enlarged homestead act, not allowable because part or all of the land has not been designated, you will promptly advise the applicant of the passage of the act of March 4, 1915, forwarding a copy of these instructions, and allowing him 30 days after notice within which to furnish the required corroborated affidavit in duplicate.

While Smelcer's application was not pending at the date these instructions were issued, yet it was made within a comparatively

short time thereafter. At any rate, said instructions contained a recognition of the fact that an application under the enlarged homestead act does not necessarily have to be complete in every respect in order to segregate the land as against a subsequently filed application. It is a fair deduction from the facts of this case that but for the mistake or oversight of the local officers, they would not have allowed Shreffler's application and would have accepted the same only for the purpose of suspending it to await the final disposition of Smelcer's application. Besides, granting that it was the duty of said officers to reject Smelcer's application when presented, inasmuch as it was not rejected, but on the contrary was accepted and placed of record, there was no reason why the defects therein could not have been cured even in the presence of an adverse claim.

The enlarged homestead act is a part of the general provisions of the homestead laws and as such is subject to the practice, regulations, and decisions applicable under said laws. The principles announced herein find support in the cases of *McCormick v. Barclay*, 21 L. D., 60; *Walk v. Beaty*, 26 L. D., 54; *Neff v. Snider*, 26 L. D., 389; *Sweet v. Behar*, 27 L. D., 557; *Lunsford v. Nabors*, 28 L. D., 73; *Junkin v. Nillsson*, 28 L. D., 333; *Spalding v. Hake*, 34 L. D., 541; and *Cate v. Northern Pacific Ry. Co.*, 41 L. D., 316.

The decision of the General Land Office herein is reversed, Shreffler's application is rejected, and Smelcer will be allowed to complete his entry in the absence of other objection.

NORTHERN PACIFIC RY. CO v. STATE OF IDAHO.

Decided April 12, 1916.

RAILROAD INDEMNITY SELECTION—PREFERENCE RIGHT OF STATE.

A railroad indemnity selection filed during the preference right period of sixty days from the date of the filing of the township plat accorded the State by the act of August 18, 1894, within which to make selection, should not be rejected but received and held suspended until final adjudication of the rights of the State under any selection filed by it during the preference right period.

JONES, *First Assistant Secretary*:

This is an appeal by the Northern Pacific Railway Company from a decision of the Commissioner of the General Land Office, dated June 27, 1910, rejecting its indemnity selection No. 02483, filed June 4, 1909; at Coeur d'Alene, Idaho, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, lots 3 and 4, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5; N. $\frac{1}{2}$, Sec. 11; E. $\frac{1}{2}$ SW. $\frac{1}{4}$, lots 3 and 4, Sec. 31, T. 43 N., R. 4 E.

The railway company's selection was filed the same day as the township plat of survey. July 30, 1909, the State of Idaho filed indemnity school land selections Nos. 02685, 02694, 02709, and 02710, embracing the above lands, claiming a preference right under the act of August 18, 1894 (28 Stat., 394), which selections were allowed by the register and receiver, August 19, 1909. The railway company's selection was rejected by the register and receiver, for conflict with the State selections, September 20, 1909, their action being affirmed by the Commissioner in the decision now under review. The Commissioner held in his decision as follows:

Under the acts of March 3, 1893 (27 Stat., 393), and August 18, 1894, *supra*, the State had a preference right for sixty days after the filing of the township plat, and it presented its application to select the lands in conflict within the preference right period.

Without passing upon the question as to the validity of the bases assigned by the State for said indemnity selections, it may be said that the lands were not subject to the company's selection until such time as the claim of the State shall have been adversely disposed of.

Notice of the Commissioner's decision was given the railway company by ordinary mail to its local counsel in Washington. An appeal was filed by them August 31, 1910, due service of notice being transmitted to the State of Idaho by registered mail. The State, however, has taken no action. In the appeal it was contended that the action of the Commissioner was erroneous in rejecting the company's selection, but that it should have been suspended subject to the State's right of selection. On September 21, 1910, the Commissioner returned the appeal, holding that it had not been filed in time. By letter of September 23, 1910, counsel for the railway company stated that they had not received notice of the Commissioner's action until July 1, 1910, and that, therefore, the appeal had been filed in time, and also requested that the matter be held in abeyance pending action upon a similar case then pending before the Commissioner. No further action was taken by the Commissioner until December 14, 1915, when he transmitted the case to the Department, calling attention to the above state of the record.

There is no evidence of service in the record upon the Northern Pacific Railway Company, and the only evidence as to the time thereof is the statement of its counsel. Such statement must, therefore, be accepted, and under it the appeal was filed in time. Under the Rules of Practice of June 26, 1901 (31 L. D., 527), in effect at that time, notice of appeal under Rule 86 must be filed in the General Land Office within sixty days from the date of the service of notice of the decision. Under Rule 97 in case of notice to resident attorneys one day additional was allowed for the transmission of notice and papers by mail. Under these rules the appeal was filed

within the proper time. The case then pending before the Commissioner of the General Land Office, and stated to be similar to the present one, has been identified as that of the State of Idaho v. Northern Pacific Railway Company (42 L. D., 118-124), involving lands in T. 42 N., R. 4 E. However, as the record pertaining to the State's selections is not before the Department, nor any full statement of facts concerning them, it can not now be determined whether the two cases are alike in their facts.

The act of March 3, 1893, *supra*, gave the State of Idaho a preference right over any person or corporation to select lands for a period of sixty days after they had been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States. The act of August 18, 1894, authorized the Governor of the State of Idaho to apply for the survey of an unsurveyed township with a view to satisfying the State's public land grants, and then provides that such lands—

shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim.

The act then provides that the Governor must publish notice of such applications for survey and of—

the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands.

The Commissioner of the General Land Office is also required to give notice immediately of the reservation of any township or townships to the local land office in which the land is situated of the withdrawal of such township or townships.

Taking the two acts together it is clear that their purpose was to secure to the State the period of sixty days within which the State should have a right to select the land superior to all others. The act of March 3, 1893, speaks of this as a preference right. The act of August 18, 1894, directs that the land shall be reserved "from any adverse appropriation."

In the present case the selection filed by the railway company was first in time and it was then unknown whether the State would exercise its right or not. The rights of the State are fully protected by suspending the railway company's selection until the State selections have been fully adjudicated. Should the State have failed to make

a proper selection there is no reason apparent why the railway company's selection, if otherwise valid, may not be allowed.

The decision of the Commissioner is accordingly reversed and the matter remanded with instructions to immediately proceed with the adjudication of the State selections, having in mind the principles laid down by this Department in *State of Idaho v. Northern Pacific Railway Company* (42 L. D., 118), and *Thorpe et al. v. State of Idaho* (43 L. D., 168), involving lands in Ts. 44 N., Rs. 2 and 3 E., should it be found that such principles are applicable to the facts in this particular matter, and to hold the railway company's selection suspended, awaiting a final determination of the State selections.

MINNESOTA DRAINAGE LAWS—ACT OF MAY 20, 1908.

CIRCULAR.

[No. 470.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 15, 1916.

REGISTERS AND RECEIVERS,

Cass Lake, Crookston, and Duluth, Minn.

SIRS: The instructions contained in Circular No. 234, approved April 24, 1913 (42 L. D., 104), issued under the act of May 20, 1908 (35 Stat., 169), known as the Volstead Act, are hereby revised and amended to read as follows:

1. All public lands in the State of Minnesota which are subject to entry, and entered lands for which no final certificates have issued, are by said act made subject to the State drainage laws to the same extent and in the same manner in which lands of like character held in private ownership are or may be subject to said laws.

2. The provisions of the act do not extend the Minnesota drainage laws to entered lands for which final certificates have issued. Lands allotted or reserved for Indians, or reserved for any other purpose, are not subject to the provisions of the act; nor are Chippewa lands classified as "pine lands," until the same have been opened to entry.

3. The lands are assessed under the State drainage laws by the designated officials of the counties in which the lands are located. The county auditor is required to file in the office of register of deeds a statement showing the drainage charges, and such charges are a lien upon the land from the date of the filing of such statement, and bear interest at the rate of 6 per cent per annum until paid. Certified lists showing the amount of the charges assessed against each smallest legal subdivision are required by the act to be furnished

the register and receiver of the district in which the lands are located as soon as the charges are assessed. It is the duty of the district land officers to compare said lists with the records of their office, and if any charges are assessed against land which is not subject to the State drainage laws, such as those mentioned in regulation 2, they will promptly notify the county auditor thereof, and advise him that the lands are not subject to sale thereunder.

4. The charges against the Government lands subject thereto may, under section 3 of the act, be enforced by a sale of the lands by the State in the same manner and under the same proceedings as such charges would be enforced against lands held in private ownership. These sales are held by the auditors of the counties in which the lands are located, in accordance with the public notice given by him, beginning on the second Monday in May of each year.

5. Purchasers of unentered lands at such sales by the State have 90 days from the date of sale within which to pay to the receiver of the proper district land office the minimum price of \$1.25 per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions, both original and final, charged in entry of like lands under the homestead laws, and make entry in accordance with section 5 of the act and these regulations.

6. Unless the purchasers of unentered lands make such entry within 90 days, any other qualified person may pay to the proper receiver of the land office the unpaid fees, commissions, and purchase price, and the sum at which the land was sold for drainage charges, including any excess, and if bid in by the State interest at the rate of 7 per cent per annum from the date of sale, and make entry for the land.

7. Purchasers of unpatented lands shall have the right to make entry for the lands within 90 days after the period of redemption fixed in the State laws has expired, there having been no redemption by the entryman, upon paying to the receiver the fees and commissions and the price of the land, less any amount paid by the entryman.

8. Unless the purchaser of entered but unpatented lands makes entry in accordance with the preceding paragraph any other qualified person may make the required payments, as specified in said paragraph, and make entry for the land.

9. If a homestead entry, after the land covered thereby has been sold for delinquent taxes, should be subsequently relinquished or canceled prior to the expiration of the period of redemption, the purchaser at the tax sale, if the taxes have not been redeemed, will have the preference right for 30 days after due notice of the cancellation or relinquishment of the entry, to file an application to purchase the land without having to wait until the expiration of the

period of redemption. Such right is given to the actual purchaser only if the land has not been redeemed. This right to purchase is not given to the homestead entryman who allowed the land to be sold for taxes and then relinquished the same.

10. In addition to the payments mentioned in the foregoing paragraphs, entrymen for lands in the former Red Lake Reservation are also required to pay the sum of 3 cents per acre, as required by section 8 of the act of May 20, 1908. The price of the land under said act of 1908 is not affected by the provisions of the free-homestead act of May 17, 1900 (31 Stat., 179).

11. In the sale of unentered lands by the State, should there be paid any excess over and above the drainage charges due, the excess amount shall be paid to the receiver before patent is issued. In the case of unpatented lands the excess shall be paid to the proper county official for the benefit of and payment to the entryman for the land.

12. When the drainage charges are paid at the district land office the receiver to whom the money was paid shall transmit to the treasurer of the county where the land is situated the amount for which the land was sold at the sale for drainage charges, together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charges if the land when sold was unentered.

If the lands are Indian lands you will deposit the price paid for the land to the credit of the appropriate Indian fund, either Red Lake, where the lands were opened under the act of February 20, 1904 (33 Stat., 46), or Chippewa, as to all other Indian lands. The 3 cents per acre drainage charge should all be deposited to the credit of the Chippewa permanent fund, as the same is intended to reimburse the Chippewa fund for appropriations made therefrom to pay the expense of preliminary drainage surveys of former Red Lake lands.

13. Purchasers of land under the act in question are required to have the qualifications of a homestead entryman, and not more than 160 acres can be sold to any one purchaser. The tracts must be entered by legal subdivisions, but they need not be contiguous or in one body.

14. A person who has made a homestead entry for 160 acres has exhausted his homestead right, unless his right is restored by act of Congress. He will not be permitted to relinquish an existing homestead entry and make entry under the Minnesota drainage laws, unless it can be satisfactorily established that he made his homestead entry in good faith for the purpose of securing a home; that he has honestly endeavored to comply with the homestead laws, and, if assessed for drainage, that he has paid the drainage charges due on the relinquished entry, and is entitled by law to make a second homestead entry. A person who makes a homestead entry for land adver-

tised for sale for drainage charges will not be permitted, unless the circumstances be exceptional, to file a relinquishment of his entry and to make an entry under the Volstead Act. The showing required to be made must be in the form of the entryman's affidavit, corroborated by two witnesses, which you will forward to this office for instructions.

15. An additional entry may be made for an amount which does not exceed 160 acres, including that previously entered, provided that this previous entry did not exhaust his homestead right; in other words, he may purchase such amount as he might then have entered under the homestead laws, and without regard to the location of the land previously entered. He need not necessarily have submitted proof on his original entry in order to be entitled to exercise his additional homestead right under the act of May 20, 1908.

16. The amount of land which may be purchased by any person will be affected by the provision in the act of August 30, 1890 (26 Stat., 391), limiting the amount of land to which title may be acquired by any one person under the agricultural public-land laws to 320 acres.

17. Persons who are the owners of more than 160 acres are not qualified to make a homestead entry in the State of Minnesota and therefore would not be qualified to purchase land at a sale of lands under said act of May 20, 1908. It is held by the department that a person purchasing land under a contract giving him right to acquire title, acquisition of which depends only on his own performance or default, is owner of such land and proprietor of it within the meaning and intent of section 2289, United States Revised Statutes. (See cases of *Smith v. Longpre*, 32 L. D., 226, and *Boyce v. Burnett*, 16 L. D., 562.)

18. Purchasers at any sale by the State under the act may make their purchases by agent or attorney to the extent permitted by the State drainage laws of sales of lands held in private ownership.

19. Affidavits as to qualifications or as to the status of lands which may be required of purchasers under these regulations may be executed before an officer authorized to administer oaths in homestead cases. The affidavit as to the nonsaline character of the land can not be made on information and belief. This affidavit, however, may be made by a reliable party who has actual knowledge of the facts. (See case of *Mendenhall v. Howell et al.*, 14 L. D., 461.)

20. It is the duty of the State officials under section 4 of the act to furnish to the proper register and receiver, immediately after the close of the sale, a statement showing the price at which each legal subdivision was sold. This statement should give the names of the purchasers and their addresses, if possible, and should also include lands bid in by the State.

When such statement has been filed in your office in accordance with the provisions of section 4 of the act, you will at once make proper notes thereof on the records of your office and also furnish this office a copy of such statement.

21. The law makes no provision for the redemption of lands by a mere settler, and therefore only entrymen have the right to pay to the county officials the drainage charges prior to the sale of land for nonpayment of such charges.

22. To avoid confusion, misunderstanding, and conflict of rights it is hereby provided that no right of redemption, referred to in section 6 of the act, can be acquired by settlement on or application for lands subject to entry after the hour and date fixed for their sale. You will suspend all applications for lands advertised for sale under said act received on or subsequent to the date of sale until after the statement of sale provided in section 4 of the act is received, unless the applicant shall show by affidavit, duly corroborated, that he settled on the land in good faith prior to the beginning of the sale, for the purpose of securing a home and not for the purpose of defeating the rights of a purchaser at the sale. If the statement referred to shows that the land was actually sold at the sale in question, the application in question will remain suspended until after the expiration of 90 days from the date of sale to give the purchaser an opportunity to make entry for the land. Should the purchaser not make entry the homestead application may then be allowed. If the statement does not show a sale of the land, or it was bid in by the State, the homestead application may be allowed. In either case payment of the drainage charges will be required, and the homestead entryman will be required to comply with the homestead laws in the matter of residence, improvements, and cultivation, in addition to paying the State drainage charges.

23. After the expiration of 90 days from the date of sale the lands will be subject to ordinary homestead entry, in which case residence, improvements, and cultivation are required, the entryman paying the drainage charges, or to entry under the act of May 20, 1908, which does not require such compliance with the homestead law.

24. There is no provision in the law which requires residence on the land purchased under the act, or cultivation or improvement thereof.

25. In case a purchaser at a tax sale of entered but unpatented land should find that the entryman had not complied with the land laws as to settlement, improvements, and cultivation, and such purchaser should secure the cancellation of the entry as a result of his contest, he would then have the right to acquire title to the land upon making payment and showing his qualifications as provided in the foregoing rules.

26. In case payment is made as above specified you will issue the usual cash certificates and receipts and forward the papers to this office, together with evidence showing the qualifications of the purchaser on the form provided therefor. Should no objection appear patent will issue in due course of business.

27. Section 5 of the act provides for the issuance of patent for unentered land to qualified purchasers at any time after the sale when the proper payments have been made. Therefore no notice of the expiration of the statutory period of redemption is required to be given the United States; but in view of the fact that settlement on the land is permitted and a settler has three months from date of settlement within which to place his entry of record no patent will issue upon such purchase until at least three months after the date of purchase unless the purchaser will furnish his affidavit showing positively that no one is claiming the land by reason of settlement, or occupancy initiated prior to the date of purchase. Purchasers of entered but unpatented lands will be required to give the notices of redemption required by the State drainage laws, but the usual final-proof notice required of homesteaders need not be given.

28. The act makes no mention of, nor reference to, assignments of drainage-tax certificates or rights acquired at any sale of land for nonpayment of a State drainage assessment. It is held, however, that a purchaser at a sale may waive his right to enter the land.

29. The United States and all persons legally holding unpatented lands under entries made under the public-land laws of the United States are entitled to all the rights, privileges, and benefits given by said laws to persons holding lands of a like character in private ownership. A copy of all notices required by the State drainage laws to be given to the owners or occupants of lands held in private ownership is required by section 7 of the act to be given the register and receiver of the proper land district in cases where unentered lands are affected, and to entrymen whose unpatented lands are affected thereby. The United States and such entrymen have the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership; and all entrymen shall be given the same rights of redemption as are given to the owners of land held in private ownership.

30. Section 8 of the act provides that entries and proofs may be made and patents issued for all ceded Chippewa lands (except in the Red Lake Reservation) which were withdrawn under the act of June 21, 1906 (34 Stat., 325), in the same manner in which entries, proofs, and patents for other lands are made and issued under the homestead laws, subject to the payment of the purchase price fixed by law for such lands. Persons making final proofs on entries in the Red Lake Reservation will be required to pay 3 cents per acre in

addition to the purchase price originally fixed by law, except in cases where entry was made prior to November 10, 1906, the date of the withdrawal under said act of June 21, 1906.

31. You will note on the application and receipt in all entries hereafter made the following: "Subject to act of May 20, 1908."

Very respectfully,

CLAY TALLMAN, *Commissioner*.

Approved:

ANDRIEUS A. JONES,

First Assistant Secretary.

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE, _____, No. _____.

APPLICATION.

I, _____ (Give full Christian name.) _____ (Male or female.),
a resident of _____ (Town, county, and State.) _____, do hereby apply to enter, under the
act of May 20, 1908 (35 Stat., 169), the _____ section _____, township _____,
range _____, _____ meridian, containing _____ acres, within the _____ land
district; and I do solemnly swear that I am not the proprietor of more than 160
acres of land in any State or Territory; that I _____
(Applicant must state whether native born, naturalized, or has filed declaration of inten-
tion to become a citizen. If not native born, certified copy of naturalization or declara-
tion of intention, as case may be, must be filed with this application.)
citizen of the United States, and am _____;
(State whether the head of a family, married or unmarried, or over 21 years of age.)
that my post-office address is _____; that this application
is honestly and in good faith made for my own benefit, and not for the benefit
of any other person, persons, or corporation; that I am not acting as agent of
any person, corporation, or syndicate in making this entry, nor in collusion with
any person, corporation, or syndicate to give them the benefit of the land entered,
or any part thereof, or the timber thereon; that I do not apply to enter the same
for the purpose of speculation, but in good faith for myself, and that I have not
directly or indirectly made, and will not make, any agreement or contract, in
any way or manner, with any person or persons, corporation, or syndicate, what-
soever, by which the title which I may acquire from the Government of the
United States will inure in whole or in part to the benefit of any person except
myself. I further swear that since August 30, 1890, I have not entered and
acquired title to, nor am I now claiming, under an entry made under any of the
nonmineral public-land laws, an amount of land which, together with the land
now applied for, will exceed in the aggregate 320 acres; and that I have not
heretofore made any entry under the homestead laws (except _____);
(Here describe former homestead entry by section, township, range, land district, and
number of entry; how perfected, or if not perfected state that fact.
that I am well acquainted with the character of the land herein applied for and
with each and every legal subdivision thereof, having personally examined
same; that there is not to my knowledge within the limits thereof any vein or

lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian.

(Sign here, with full Christian name.)

NOTE.—The remainder of the form is in accordance with the usual homestead blanks 4-007.

AN ACT To authorize the drainage of certain lands in the State of Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands in the State of Minnesota, when subject to entry, and all entered lands for which no final certificates have issued, are hereby made and declared to be subject to all of the provisions of the laws of said State relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in the same manner in which lands of a like character held in private ownership are or may be subject to said laws: *Provided,* That the United States and all persons legally holding unpatented lands under entries made under the public-land laws of the United States are accorded all the rights, privileges, and benefits given by said laws to persons holding lands of a like character in private ownership.

SEC. 2. That the cost of constructing canals, ditches, and other drainage works incurred in connection with any drainage project under said laws shall be equitably apportioned among all lands held in private ownership, all lands covered by unpatented entries, and all unentered public lands affected by such project; and officially certified lists showing the amount of the charges assessed against each smallest legal subdivision of such lands shall be furnished to the register and receiver of the land district in which the lands affected are located as soon as said charges are assessed, but nothing in this act shall be construed as creating any obligation on the United States to pay any of said charges.

SEC. 3. That all charges legally assessed may be enforced against any unentered lands, or against any lands covered by an unpatented entry, by the sale of such lands subject to the same manner and under the same proceedings under which such charges would be enforced against lands held in private ownership.

SEC. 4. That when any unentered lands, or any lands covered by an unpatented entry, have been sold in the manner mentioned in this act, a statement of such sale showing the price at which each legal subdivision was sold shall be officially certified to the register and receiver immediately after the completion of such sale.

SEC. 5. That at any time after any sale of unentered lands has been made in the manner and for the purposes mentioned in this act patent shall issue to the purchaser thereof upon payment to the receiver of the minimum price of one dollar and twenty-five cents per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions charged in entry of like lands under the homestead laws. But purchasers at a sale of unentered lands shall have the qualification of homestead entrymen and not more than one hundred and sixty acres of such lands shall be sold to any one.

purchaser under the provisions of this act. This limitation shall not apply to sales to the State, but shall apply to purchases from the State of unentered lands bid in for the State. Any part of the purchase money arising from the sale of any lands in the manner and for the purposes provided in this act which shall be in excess of the payments herein required and of the total drainage charges assessed against such lands shall also be paid to the receiver before patent is issued.

SEC. 6. That any unpatented lands sold in the manner and for the purposes mentioned in this act may be patented to the purchaser thereof at any time after the expiration of the period of redemption provided for in the drainage laws under which it may be sold (there having been no redemption) upon the payment to the receiver of the fees and commissions and the price mentioned in the preceding section, or so much thereof as has not already been paid by the entryman; and if the sum received at any such sale shall be in excess of the payments herein required and of the drainage assessments and cost of the sale, such excess shall be paid to the proper county officer for the benefit of and payment to the entryman. That unless the purchasers of unentered lands shall, within ninety days after the sale provided for in section three, pay to the proper receiver the fees, commissions, and purchase price to which the United States may be entitled, as provided in section five, and unless the purchasers of entered lands shall, within ninety days after the right of redemption has expired, make like payments, as provided for in this section, any person having the qualifications of a homestead entryman may pay to the proper receiver for not more than one hundred and sixty acres of land for which such payment has not been made: First, the unpaid fees, commissions, and purchase price to which the United States may then be entitled; and, second, the sum at which the land was sold at the sale for drainage charges, and in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount at which the land was sold at the sale for drainage charges, together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charge, if the land when sold was unentered.

SEC. 7. That a copy of all notices required by the drainage laws mentioned in this act to be given to the owners or occupants of lands held in private ownership shall, as soon as such notices issue, be delivered to the register and receiver of the proper district land office in cases where unentered lands are affected thereby and to the entrymen whose unpatented lands are included therein, and the United States and such entrymen shall be given the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership; and all entrymen shall be given the same rights of redemption as are given to the owners of lands held in private ownership.

SEC. 8. That hereafter homestead entries and final proofs may be made upon all ceded Chippewa Indian lands in Minnesota embraced in the withdrawal under the act of June twenty-first, nineteen hundred and six, entitled "An act making appropriations for the current and contingent expenses of the Indian Department" (Thirty-fourth Statutes at Large, page three hundred and twenty-five), and patents may issue thereon as in other homestead cases, upon the payment by the entryman of the price prescribed by law for such land and on

entries on the ceded Red Lake Reservation in addition thereto the sum of three cents per acre to repay the cost of the drainage survey thereof, which addition shall be disposed of the same as the other proceeds of said land.

Approved, May 20, 1908. (35 Stat., 169.)

VOIGT v. BRUCE.

Motion for rehearing of departmental decision of January 15, 1916, 43 L. D., 524, denied by First Assistant Secretary Jones, April 15, 1916.

W. P. FENNELL.

Decided April 17, 1916.

SIoux HALF-BREED SCRIP—SURRENDER AND REISSUE.

There is no provision of law specifically authorizing or requiring the Secretary of the Interior to accept the surrender of Sioux half-breed scrip and issue new scrip of lesser denomination in lieu thereof; and such subdivision and reissue will be allowed, if at all, only in cases where it appears from the records of the General Land Office that the scrip is free from all conflicting claims.

LANE, *Secretary*:

W. P. Fennell, attorney for Anna R. Kean, has filed a motion for rehearing of the matter involved in the instructions of December 13, 1915 [unreported], denying an application to surrender certain Sioux half-breed certificates for 160 acres each, and to receive four new certificates for 40 acres each, in lieu of each canceled certificate.

The original certificates were issued November 24, 1856, by the Commissioner of Indian Affairs, under the provisions of the act of July 17, 1854 (10 Stat., 304), and were located on land within lake beds in Indiana, surveyed as public land of the United States after the surrounding land had been surveyed and disposed of. The patents were declared invalid by the Supreme Court of the United States (*Kean v. Calumet Canal Co.*, 190 U. S., 452), and the certificates were delivered to the applicant by the Commissioner of the General Land Office under the departmental letter of April 29, 1914, which the decision under review directs shall no longer be followed.

The applicant's rights accrue through purchase of the land prior to the cancellation of the patents. The certificates were delivered to her to be located in the names of the half-breeds by persons duly authorized to make the locations.

It has been held that there is no legal objection to the Secretary of the Interior directing the subdivision of Sioux half-breed certi-

cates, yet he is under no duty to do so. There is no legal right of subdivision reserved under the law, and there has been no general practice allowing subdivision. Out of 1999 certificates issued for 80 acres or more, I am informed that less than ten have been subdivided; that only 43 certificates remain unpatented, and that these have either been located on unsurveyed land, or prior locations have been canceled, as in these instances.

By the terms of the act under which the scrip was issued, it is not assignable, and if subdivision is allowed where conflicting claims exist, it may lead to a multiplicity of proceedings before the land department and the courts, even though the certificates are reissued in the name of the half-breed. Subdivision will be allowed, if at all, only when it appears from the records of the General Land Office that the scrip is free from all conflicting claims. The records in these cases present such possible issues of law and fact affecting the ownership and right of the applicant to surrender these certificates, that I must concur in the conclusion reached by the instructions of December 13, 1915.

The practice of the General Land Office in relation to the divisibility of the right has been put in issue, and it has been urged as a reason for allowing subdivision, that under the rule announced in the case of *F. W. McReynolds* (31 L. D., 259), the applicant can accomplish indirectly what is denied in this application. There is no provision in the regulations for the partial location of a certificate, and applications for the return, or reissue, of Sioux half-breed scrip under the rule in *F. W. McReynolds*, *supra*, were denied by the Commissioner of the General Land Office (*Ex parte W. E. Moses*, September 27th and October 27th, 1915) and are now before the Department. The decision on those applications can not affect the conclusions reached with respect to the subdivision of these certificates.

CHRISTOPHER C. GINGERY ET AL.

Decided April 18, 1916.

DESERT LAND ENTRY—IMPERIAL VALLEY—AMENDMENT.

Apart from and independent of the requirement of adjustment to a resurvey, desert land entries made in Imperial Valley, California, are no exception to the rule permitting the amendment of an entry where the entryman has improved a tract of land which he had endeavored in good faith to properly describe in making the entry.

JONES, *First Assistant Secretary*:

Christopher C. Gingery, Flora May Hill (now Coleman), and Elizabeth Lane, have each appealed from the decision of the General

Land Office, rendered July 24, 1915, adjusting their desert land entries and applications, respectively. Homer Downing, whose desert-land application is involved, has asked a hearing.

The tracts involved are all in T. 15 S., R. 12 E., S. B. M., in Imperial Valley, California. The township is one of those ordered resurveyed by the act of July 1, 1902 (32 Stat., 728). It was originally surveyed in 1857, but the corners had become so far obliterated and lost as to render it difficult, if not impossible, to identify the locus of any particular tract with the description given in the plats of the survey of 1857 on file in the local land office at Los Angeles. The local officers were directed to permit entry of these lands under the desert-land law, upon applications describing them according to the survey of 1857, but only to allow the same subject to adjustment to the lines of the resurvey authorized by the act of July 1, 1902, before mentioned.

The plat of resurvey of the township was approved March 15, 1909, and filed in the local office June 15, 1909. The location, under the resurvey, of any given subdivision of the land here involved, is substantially $1\frac{1}{4}$ miles south and $\frac{3}{4}$ mile west of its location as given on the plats of the 1857 survey.

Christopher C. Gingery, on June 10, 1907, made desert land entry, according to the survey plat approved March 2, 1857, of the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 7, the SW. $\frac{1}{4}$ Sec. 8, and the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 18, above township, range, etc. June 24, 1909, he filed application to adjust his entry to the lines of the resurvey, so as to embrace the—

S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 17, N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 20, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 18, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 19, Tp. 15 South, Range 12 East, S. B. M.

Gingery's application to so adjust his entry was rejected by the General Land Office, October 21, 1910, as to the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 20, for the reason that under the resurvey there was no such legal subdivision, but only certain lots, and for the further reason that a part of what would have been the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 20 was reserved for the survey of a school section. This reserved section was later designated as tract 81. August 6, 1912, the local officers were directed to advise Gingery that the portion of what would have been the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 20, outside of tract 81, had been designated as lots 3 and 4, and that if he desired, he might file an application to include these in his application to adjust. This he did, November 9, 1912.

November 11, 1907, Samantha Bell Souder made desert-land entry for the NW. $\frac{1}{4}$, Sec. 20, of said township, according to the 1857 survey, and on January 22, 1909, assigned the north half of said quarter section to Hezekiah Bohannon (Serial No. 02829), having previously, on December 12, 1908, submitted first annual proof, showing an expenditure of \$160. Souder, on December 13, 1909, applied to

adjust the remainder of her entry (the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 20), to the lines of the resurvey, so as to embrace lot 2, and the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 30, of the township, being land $1\frac{1}{4}$ miles south and $\frac{3}{4}$ mile west of the land covered by the description under the survey of 1857. This entry was by the local officers adjusted as requested. Souder's entry was canceled July 20, 1911, for failure to submit third annual proof.

Bohannon, on September 23, 1909, filed application to adjust his entry (02829) of the 80-acre tract assigned to him by Souder, so as to embrace lots 3 and 4, Sec. 20, the creation of tract 81 having rendered the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 20 fractional. This adjustment, as requested, was noted on the records of the local office and the General Land Office, apparently overlooking Gingery's prior application to adjust to embrace the whole of the NW. $\frac{1}{4}$, Sec. 20, as indicated by the 1857 survey, which application was then under consideration by the General Land Office, in view of its conflict with the school section (tract 81). Bohannon, on July 9, 1912, assigned this entry, described as lots 3 and 4, Sec. 20, to Mabel C. Lee, three annual proofs having theretofore been accepted, and an extension of time to make final proof having been recommended by the local officers. Elizabeth Lane, on November 2, 1914, applied to make desert entry of the land, accompanying her application with the relinquishment of Lee, executed June 5, 1914. Mrs. Lane was permitted to make entry (No. 024930).

December 1, 1911, Flora May Hill (now Coleman), filed desert-land application 014347 for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, of said township. This was suspended, April 5, 1912, on the ground of conflict as to the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, with Gingery's application to adjust his entry 04697, then pending before the Commissioner.

Homer Downing, on June 16, 1909, filed desert-land application, 06602, for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 19, of the above-mentioned township. Said application was suspended by the local officers June 15, 1910, because of conflict as to the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 19, with Gingery's above-mentioned application for adjustment of entry. In a sworn statement, executed June 4, 1913, and addressed to the Commissioner of the General Land Office, Downing states that, prior to the filing of the plat of resurvey of the township, he went upon the land later covered by his said application, plowed furrows around the exterior lines of the same, and upon the filing of the plat of resurvey, presented his application above mentioned to make desert entry; that, apparently, no action was taken by the local officers until September 2, 1910, when he received a notice stating that his application was suspended for conflict with the claim of Gingery; that Gingery has never appeared on the

land or had work done thereon, while he (Downing), has done several hundred dollars' worth of work thereon and submitted the three annual proofs required by law. He therefore asked that a hearing be ordered to determine the rights of Gingery and himself respecting the land in conflict. Gingery claims that he has improved the land in conflict, and that his improvements have been removed or obliterated.

The lands actually covered by Gingery's desert-land application under the descriptions of the 1857 survey as adjusted to points $1\frac{1}{4}$ miles south and $\frac{3}{4}$ mile west, have been appropriated by other persons under what appear to be valid selections.

The decision of the General Land Office here appealed from held Mrs. Coleman's application for rejection as to the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, in conflict with Gingery's claim; held Mrs. Lane's entry for cancellation in its entirety; held Downing's right superior to that of Gingery as to the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19; and allowed Gingery's application to adjust as to the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 17, the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, and lots 3 and 4, Sec. 20, and rejected said application in so far as it included the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19. In the decision it was further stated that—

Nothing herein said or directed shall be construed as precluding response and showing of good and sufficient cause against the proposed disposition of these cases by any of the interested persons.

As stated above, Mrs. Lane and Mrs. Coleman have appealed from the Commissioner's decision, and the application of Downing for a hearing is pending.

In her appeal, Mrs. Lane states that before purchasing the relinquishment of Mabel C. Lee, she made inquiry as to title and the land's possibilities of reclamation, and found that Bohannan's application to adjust his entry so as to cover this land had been approved, and that Mabel C. Lee, the assignee of Bohannan, had been granted an extension of time for three years, in which to bring water upon the land. She thereupon obtained a certificate from No. 8 Water Company that they would later be able to furnish water for the irrigation of the land, and made arrangements to have her assessment work done on the land.

Mrs. Coleman appeals upon the stated ground that Gingery has no legal right to the land claimed by him; that he made entry of the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, the SW. $\frac{1}{4}$, Sec. 8, and the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 18, according to the survey plat approved March 2, 1857, and that the locus of these lands, upon resurvey, was ascertained to be approximately $1\frac{1}{4}$ miles south and $\frac{3}{4}$ mile west of the locus as given in the 1857 survey; that Gingery did not adjust his entry so as to take lands $1\frac{1}{4}$ miles south and $\frac{3}{4}$ mile west of the lands covered by his entry, but laid

claim to other lands to the east thereof, and that, therefore, he has no legal right to any of the lands he claims in his application to adjust.

Apart from, and independent of, the requirement of adjustment to a resurvey, desert-land entries made in Imperial Valley, California, are no exception to the rule permitting amendment of entry where the entryman has improved a tract of land which he had endeavored, in good faith, to properly describe in making entry. See section 2372, Revised Statutes, as amended February 24, 1909 (35 Stat., 645). The procedure governing amendments, outlined in the act of February 24, 1909, has not been followed by Gingery, but his application to adjust, as disclosed by the record, is in substance and effect the equivalent of an application for amendment, and, under the general supervisory authority vested in the Secretary, action will be taken as on a regular application for amendment of entry, such application being resisted by Coleman, Lane and Downing, each claiming superior right to some portion of the land.

Since amendment of entry is not permitted where its effect would be to take lands to which others have superior right (and this is claimed by Coleman, Lane and Downing), the case is remanded to the General Land Office, with direction that a hearing be ordered, as in the case of land contests, at which the interested parties may show, with regard to each tract in controversy, who first took steps looking to its reclamation, and has maintained such improvement. To this extent, the decision appealed from is modified.

CLARKE v. HALVERSON.

Decided January 4, 1916.

FOREST LIEU SELECTION—OCCUPANCY—SETTLEMENT CLAIM.

The fact that part of the land in a forest lieu selection was occupied adversely to the selector at the date of the filing of the selection does not render the entire selection invalid, but as to the land not so occupied the selection is good and superior to any settlement claim subsequently initiated.

CONFLICTING DECISION MODIFIED.

DeLong v. Clarke, 41 L. D., 278; modified in so far as in conflict.

JONES, *First Assistant Secretary*:

July 24, 1899, C. W. Clarke filed in the local land office at Olympia, Washington, an application under the act of June 4, 1897 (30 Stat., 36), to select certain unsurveyed lands situated in township 15 N., R. 6 W., Olympia, Washington, land district. Certain parts of the selection have been eliminated, and the selection now embraces 1,800 acres, situated in sections 10, 14, 22, 26, 28 and 34, of said township and range.

This case has been once before considered by the Department, and was then known as *DeLong et al. v. Clarke* (41 L. D., 278). A decision was rendered by the Department August 24, 1911, affirming the

decision of the Commissioner of the General Land Office, dated April 19, 1911, holding the selection for cancellation as to the tracts involved; but, upon motion for rehearing, said departmental decision was modified in 41 L. D., 278, *supra*. In that decision, the case was remanded to the Commissioner for further hearing; it being held that the rights of the selector attached from August 3, 1903, and further opportunity was given the protestants of this selection to submit evidence with reference to the occupancy of the lands prior to this date. Such hearing was had before the local land office, and the case is now before the Department for consideration upon the record then made, appealed by the selector from the Commissioner's decision of July 6, 1914, affirming the action of the local officers, and rejecting the said selection.

In the decision of *De Long v. Clarke*, the Department held:

It appears, however, that at the date of the approval of the survey (i. e., the acceptance thereof by the Commissioner of the General Land Office), said selection was a subsisting selection, based upon executed conveyances to the United States of the base lands, and filed and prosecuted in compliance with the regulations then in force (28 L. D., 521; 29 L. D., 391), and the selector, on the filing of the survey plat, adjusted, or attempted to adjust his selection thereto in further compliance with the regulations in force at that time (31 L. D., 372), and submitted his selection for final approval.

Such submission was, in effect, a reselection of these lands.

Following this determination, it was held in said decision that the rights of said selector attached only from August 3, 1903, the date upon which he advised the Department that the selection conformed to the lines of survey, and requested that patent issue to him for the lands selected. Upon mature consideration, the Department is not disposed to adhere to the doctrine laid down in said decision. This doctrine was apparently predicated upon the theory that because a small portion of the selected lands were occupied adversely to the selector at the date of filing his original selection the entire selection was invalid. Such, however, is not the case. While it is true that the selection was invalid as to such lands as were occupied adversely to the selector at the date of filing his selection, as to lands not so occupied the selection was a valid, subsisting claim, superior to any settlement claim subsequently initiated. Under such circumstances the lieu selection being first in time is first in right and the Land Department has no power to award the tracts to subsequent claimants under the public land laws. (See *Daniels v. Wagner*, 237 U. S., 547.)

The testimony shows that with the exception of the W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 28, later discussed herein, the lands were not occupied at the date of the filing of the selection. The occupation and improvements by the various protestants were not made until between the years 1900 and 1903.

With reference to the W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 28, the testimony discloses that in 1897 or 1898 J. N. Howard built a log cabin upon the tract for one Briscoe, the cabin being there when the selection was filed. Briscoe sold his improvements to Hiram Layport in 1900. Layport built another cabin and made other improvements. In 1910, Mrs. Vanderpool settled upon the land and had been continuously residing there until the date of the hearing.

The act of June 4, 1897 (30 Stat., 36), under which the selection is made, permits the selection of "vacant land open to settlement." In *De Long et al. v. Clarke*, *supra*, it was held:

The validity of the selection depends upon the conditions existing at its date. Under the specific provisions of said act of June 4, 1897, only "vacant lands open to settlement" are subject to such selection. These lands being occupied at the date of the selection, such selection was invalid, and subsequent abandonment of the lands by the then occupant thereof did not operate to validate it. See *Frank et al. v. Northern Pacific Railway Company* (37 L. D., 193, 502); *St. Paul, Minneapolis and Manitoba Railway Company v. Donohue* (210 U. S., 21, 40).

As to all of the tracts, therefore, except the W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 28, there was no occupation or adverse claim of any character at the time of the filing of the lien selection. As to such tracts the selection will be allowed to remain intact in the absence of other objection, and the applications of the various protestants herein will be rejected. The selection will be canceled as to the W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 28, since the record discloses that the land was occupied and contained improvements at the time of filing the selection.

The Commissioner's decision, except as to the W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 28, is reversed. The case of *De Long v. Clarke* (41 L. D., 278) is modified in so far as it conflicts with this decision.

CLARKE v. HALVERSON.

Motion for rehearing of departmental decision of January 4, 1916, 45 L. D., 54, denied by First Assistant Secretary Jones April 26, 1916, with modification of that decision as to certain matters of fact.

ALASKA PETROLEUM AND COAL CO.¹

Decided November 11, 1915.

CONSOLIDATION OF COAL CLAIMS IN ALASKA—ACT OF MAY 28, 1908.

The provision in the act of May 28, 1908, authorizing the consolidation of coal land locations in the Territory of Alaska under certain circumstances, contemplates only such valid and complete locations as had been in good faith

¹ See decision on motion for rehearing p. 65.

made and maintained in accordance with the provisions of the prior existing law of April 28, 1904; and does not operate to validate or cure prior locations which were defective or invalid because of failure to open or improve mines, erect monuments, or to prepare and file notice of location as required by the law in force at that time.

ALASKA COAL LANDS—OPENING AND IMPROVING OF MINE.

Under the coal land laws applicable to the Territory of Alaska work done merely for prospecting purposes, and not with the purpose or design of actually mining and producing coal, does not meet the requirements of the statute and does not serve as a basis for a valid location.

JONES, *First Assistant Secretary:*

This is an appeal by the Alaska Petroleum and Coal Company from a decision of the Commissioner of the General Land Office dated December 31, 1914, holding for rejection its coal land application 0308 made January 14, 1909, under the act of May 28, 1908 (35 Stat., 424), for the following coal claims in the Juneau land district, Alaska:

1. Summit, survey No. 203, located July 6, 1904, in name of Adolph Behrens.

2. Portland, survey No. 204, located July 6, 1904, in the name of Henry R. Harriman.

3. St. Mary's, survey No. 205, located September 21, 1904, in the name of Otto E. Sauter.

4. Success, survey No. 206, located July 6, 1904, in the name of Thomas S. Lippy.

5. Vancouver, survey No. 207, located July 6, 1904, in the name of Clark Davis.

6. Fremont, survey No. 208, located July 6, 1904, in the name of A. B. Hunt.

7. Virgin, survey No. 209, located July 6, 1904; in the name of Roland J. Mahoney.

8. Whatcom, survey No. 210, located July 6, 1904, in the name of Charles W. Davis.

9. Anacortes, survey No. 211, located May 31, 1904, in the name of John Schram.

10. Ellensburg, survey No. 212, located July 6, 1904, in the name of John L. Moseley.

11. Olympic, survey No. 213, located July 6, 1904, in the name of Geo. F. Cotterill.

12. Latona, survey No. 214, located August 28, 1906, in the name of Cleo Davis.

Posting and publication in this case were duly had and on November 9, 1909, the purchase money, amounting to \$16,393, was paid and receiver's receipt therefor issued.

Thereafter, on January 6, 1910, proceedings were ordered by the Commissioner of the General Land Office upon the following charges, predicated upon the report of a special agent:

1. That the claimants did not make their respective locations and filings for their own exclusive, individual use and benefit but that they and each and every one of them prior to making said locations and filings on and for the lands involved, entered into an agreement or understanding each of them with each and every other one of them whereby it was agreed and understood that after obtaining patent for said lands they the said claimants and each and every one of them would consolidate and combine and hold the lands embraced in said locations and filings for their joint use and benefit which agreement and understanding was carried out in the making of said locations and filings.

2. That said claimants did not locate and file upon the lands embraced in and covered by their several filings in good faith with intent that the legal title to the lands covered by each of several filings should be acquired pursuant to the laws of the United States governing the entry, sale, or disposition of public lands, valuable for the coal deposits contained therein, for the separate and several use and benefit of the individual claimants, but each of said locations and filings was made pursuant to the unlawful purpose and intent that the title acquired thereby and thereunder might and should inure to the use and benefit in equal measure of the entryman and to each and every one of the several other persons by whom said coal declaratory statements mentioned above were made or to the use and benefit of an association or corporation by them formed or entered into or contemplated and of which they were to be members and stockholders by themselves or in association with such other persons as they might admit or who might secure entrance therein.

3. That the locators and claimants, of the several tracts and parcels of land covered by and embraced within the above mentioned coal declaratory statements did not, they or any of them, prior to making such locations or at any other time, thereafter and prior to filing notices of said locations open or improve any mine or mines of coal in and upon any of said tracts of land.

After due notice and denial of charges, testimony was taken and on September 11, 1912, the local officers rendered a decision holding that the Government had conclusively established the truth of the charges, Nos. 1 and 2, and so much of charge No. 3 as relates to Vancouver, St. Mary's, Ellensburg, Olympic, Anacortes, and Latona claims, and that charge No. 3 had not been sustained as to the Fremont, Success, Portland, Virgin, Summit, and Whatcom claims.

Upon appeal from this action the decision of the local officers was modified by the Commissioner of the General Land Office on December 31, 1914, and it was held that the charges had been sustained as to all of the claims and that the application in its entirety should be rejected. Further appeal brings the matter here for consideration.

The voluminous record in this case and the various briefs filed in behalf of the claimant company have been carefully examined. Much of the testimony adduced at the hearing relates to the question as to whether the locations were made for the exclusive use and benefit of

the individual locators or for the benefit of the Alaska Petroleum and Coal Company. However, in view of the facts disclosed by the record upon the question as to whether a mine of coal was opened or improved upon the claims, the Department finds it only necessary to discuss and determine this latter feature of the case, except as to the Fremont claim.

Immediately after the passage of the act of April 28, 1904 (33 Stat., 525), the locators of the claims here involved executed powers of attorney, authorizing A. B. Hunt to open up, locate, survey, stake and record coal claims in the Kayak recording district of Alaska in the name of the party granting the power; to file all necessary papers therefor; to make application to purchase and to take all steps that might be necessary to secure issuance of patent. Hunt immediately thereafter left for Alaska and under the powers thus granted him, located nine of the claims on July 6, 1904, another on May 31, 1904, another on September 21, 1904, and the other on August 28, 1906. Notice of location of eleven of these claims was filed for record February 10, 1905, and the other on August 28, 1906.

Coal declaratory statements were presented to the local office on May 5, 1905, and July 1, 1907, and the claims were surveyed July, August and September, 1907.

During the years 1904, 1905, 1906 and 1907, the improvements upon the claims were made under the personal direction and supervision of Mr. Hunt. In 1904 Hunt prospected, by means of small excavations, the coal veins which outcropped along the sides of ravines traversing the claims, and it is alleged that this work was done at the expense of and for the benefit of the individual locators. In May, 1905, a tentative contract of lease upon a royalty basis was entered into between the company and individual claimants, and under this agreement the work upon the claims was thereafter done at the expense of the company. The following is a statement by Clark Davis, one of the officers of the company, as to the money expended and improvements made for the company upon these claims in 1905 to 1910, inclusive:

1905.

The Company had 5 men employed building trails for 4 months at an average cost of \$150 per month per man, making a total cost for labor, and the feeding and care of men.....	\$3,000
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In addition, a bunk house and office log building was erected by contract at a cost of.....	275
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Making a total expenditure for the year of.....	\$3,275.00
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1906.

Prospecting work was carried on, open cuts were made on veins, and prospect tunnels run, on which 5 men were employed for 5 months, at a total cost to the Company of \$150 per man per month----- \$3, 750

In the Fall, beginning in October, a working tunnel was started on the Fremont Claim, and driven in for 25 feet, at a total cost, including the cutting away in the Mountain side for room for this tunnel----- 500

Making a total expenditure for the year of----- \$4, 250. 00

1907.

Work on the tunnel was continued and 70 ft. more was driven, the tunnel being timbered on the two sides and the roof at a cost of----- \$1, 400

Also, engineering work covering the location of veins, location of bunkers, and plans for same, and terminal site on property, at a total cost of----- 2, 530

Making a total expenditure for the year of----- \$3, 930. 00

1908.

Tunnel work continued, 195 ft. at a total cost of \$18 per foot----- \$3, 510. 00

Ventilation plant installed----- 150. 00

Making a total expenditure for the year of----- \$3, 660. 00

1909.

An air shaft from the surface on the Mountain side tapping that end of the tunnel; this air shaft was 130 ft. long, and cost \$9 per ft., at a total cost of----- \$1, 170. 00

Late in the season the work was continued on the tunnel at a cost of----- 637. 00

Paid on the Government *in full* for 1639.30 acres of Coal Land November 9----- \$16, 390. 30

Making a total expenditure for the year of----- \$18, 197. 30

1910.

Machinery, including air compressors, boiler, pipes, and equipment for the Mine was purchased in Seattle at a cost of----- \$1, 960. 25

The total cost of freight from Seattle to the Mine and for the installing of the machinery at the mine was-- 1, 897. 16

A road was constructed from Canoe Landing to the mouth of the tunnel, a distance of 3 miles, at a cost of \$100 per mile----- 300. 00

A cross-cut was driven in solid rock 180 ft. at a cost of \$10 per ft-----	\$1, 800. 00
Power house, Blacksmith Shop, and Powder House were constructed at a cost of about-----	700. 00
Making a total expenditure for the year of-----	\$6, 657. 41
Total expenditures for the six years-----	39, 969. 71

Mr. Hunt who had charge of the development of the claims testified that his instructions were to go upon the ground and find coal upon each of the locations, and that acting upon such instructions he prospected the coal veins upon their outcrops at various points; that as soon as he had faced up the coal and disclosed both walls of the vein he would move on to the next claim and continue his work in a similar manner; that this work was done for the purpose of determining the thickness and continuity of the veins and whether the coal was of such commercial quality and in such quantities as to warrant the large expenditure necessary for the opening of a commercial mine.

The principal improvement made by Mr. Hunt was upon the Fremont claim where a tunnel 20 feet long was run in 1906, and continued in 1907 to a length of 70 feet, and in 1908 to a total length of 195 feet. Mr. Hunt testified that this tunnel was driven for the purpose of prospecting and that he made no effort to locate a working tunnel designed for the commercial mining of coal. A part of Mr. Hunt's testimony along this line is as follows:

Q. The object of that development work was not then to mine coal?

A. No. It was not my intention at all, and it was not the report that I made to Mr. Davis. The report I made to him was that I had found an ideal spot for a prospecting tunnel.

Q. It was?

A. Yes.

Q. Had you found any ideal spot for mining coal at that place?

A. No.

Q. If you had intended to mine coal, would you have selected that particular vein or that particular place on that claim?

A. On that claim I would, yes.

Q. Would you have considered that a proper location for the purpose of mining coal?

A. No. I would never have made any location. I did not consider myself competent to make a location for a working tunnel.

It was further testified as to this feature of the case by the locators that they realized that they would be unable to open a commercial mine individually upon any one of the claims and that some sort of eventual cooperation was always contemplated.

It is further contended by counsel for claimant company that if the locations were at all lame with respect to the work necessary to constitute the opening or improving a coal mine under the act of 1904,

this condition was cured by the act of May 28, 1908, *supra*. Section 1 of the act of May 28, 1908, provides:

That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations.

The permissive provisions of the act of 1908 are made applicable only to prior locations of coal lands in the Territory of Alaska. At and prior to that time the only way in which a claim could be initiated to unsurveyed coal lands in the Territory was in the form and manner provided by the act of April 28, 1904, *supra*, which act specifically described the conditions attendant upon a valid location. An examination of section 1 of that act shows that it was, in part, at least, an adaptation of the mining laws, in so far as location and recordation are concerned, to the unsurveyed coal lands of Alaska. The initial step in a location was the opening or improving of "a coal mine or coal mines." A qualified person or association who had so opened or improved a coal mine or mines was entitled to locate the lands "upon which such mine or mines are situated" by marking the corners with permanent monuments, and were thereafter required to file notice of such location for record in the office of the district recorder and of the register and receiver of the land district. It is therefore clear that no location was valid or became valid until the actual opening or improving of a coal mine or mines, and that as the act of 1908, *supra*, did not undertake to prescribe new rules or methods for the making or perfection of locations, but dealt with prior existing locations, it contemplated the perfection only of such prior locations as had been made and maintained in accordance with the provisions of the prior existing law of 1904. In other words, the act of 1908 was not designed to and did not validate or cure prior locations which were defective or invalid because of failure to open or improve mines, because of failure to erect monuments, or of failure to prepare and file notice of location as required by the law in force at that time. It contemplated and dealt with locations valid and complete and which might have passed to entry and patent as separate and individual claims, had it not been for certain arrangements or agreements entered into between locators of contiguous lands contemplating the holding and working of their claims for the common benefit. To the extent that it relieved from these violations of law, the act was curative and remedial, but it clearly contemplated and required that the claims must have been in all respects valid at time of location or at least prior to the withdrawal of the land by Executive order of November 12, 1906. See opinion of the Attorney General (38 L. D., 86), and *United States v. Munday* (222 U. S., 182-3).

It clearly appears from the record in this case that the numerous excavations made upon the surface of the claims applied for were merely for prospecting purposes; not designed for the production of coal, and can not be denominated as coal mines within the meaning of the coal-land laws. The tunnel hereinbefore described, located upon the Fremont claim, may, however, in the opinion of the Department, be fairly regarded as a coal mine opened prior to the time of Executive withdrawal, thus validating the location in which it lies, and that same was diligently and consistently improved during the years 1907, 1908, 1909, and 1910. It is therefore held that patent may, in the absence of objection other than disclosed in the record before me, issue upon the Fremont claim. As to the other claims, as already indicated, it is clearly shown that no mine or mines were opened or improved prior to date of location, prior to date of withdrawal, or at any time.

In the case of Andrew L. Scofield *et al.* (41 L. D., 176), involving the question of whether a mine of coal has been opened or improved upon certain coal claims in Alaska situate in the vicinity of the claims here involved, it was held:

A small amount of open-cut work, merely for prospecting purposes, does not meet the requirements of the coal-land laws conferring a preference right of purchase upon one who opens and improved a coal mine upon the public domain.

In the case of John L. Long (43 L. D., 305), also involving the question as to whether a mine of coal had been opened or improved upon a coal claim in Alaska, it was said:

It was a valuable right, and of course should be construed as having been conferred by Congress only upon a valuable consideration. In looking into these sections it is found that this valuable right is conferred only upon those "who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same." The conclusion is irresistible that Congress intended by the granting of this privilege to encourage the actual opening of a coal mine with a view to present use of the coal. Any other construction would subject Congress to the criticism of having conferred a valuable right without adequate consideration and without any service performed contributing to the public welfare. The requirement that the persons seeking this privilege "shall be in actual possession of the same," and the further provisions in section 4 of the act that the possession shall be followed by "continued good faith," can bear no other construction than that the preferred claimant shall be engaged in good faith in the opening and developing of a producing mine.

It is very earnestly contended, however, by counsel for the claimant company, that in the Scofield case a new and different meaning was for the first time given the term mine, and that the Department departed from a line of decisions which had been relied upon by coal claimants in which it was held substantially that where coal had been disclosed the requirements of the law had been met and a

preference right of entry accrued. In support of this contention, the following departmental decisions are cited: Watkins *et al. v. Garner* (13 L. D., 414); McGillicuddy *et al. v. Tompkins et al.* (14 L. D., 633); Paire *v. Markham* (21 L. D., 197); Ouimette *v. O'Connor* (22 L. D., 538); Reed *v. Nelson* (29 L. D., 615).

An examination of the cases last cited shows that they were all decided prior to the enactment of the Alaskan coal-land acts of 1904 and 1908, *supra*, and related to coal lands in the United States disposable under the provisions of sections 2347 *et seq.* of the Revised Statutes. They involved a determination of conflicting claims upon such lands between individual claimants in which the question of priority of possession and improvement was considered in determining the preference right of purchase. Neither the sections of the Revised Statutes mentioned, nor the regulations thereunder, define, with particularity, what constitutes the opening and improving of a mine of coal. The regulations of 1882 (1 L. D., 687, par. 18) did state that the opening and improving of a mine of coal must not be considered as a mere matter of form, but the work performed and improvements made must be such as to clearly indicate the good faith of the claimant.

The decisions cited by counsel contain, in express terms, no definition of the opening and improving of a mine. In those cases prominence was given to and emphasis laid upon the features of prior possession, improvements, and the good faith of the prevailing claimants; and these considerations largely controlled the award. The lands involved in those cases were surveyed public lands, subject to sale, and, in so far as the controversies before the Department were concerned, presented the question merely as to which of the two contending claimants should be permitted to purchase and acquire the land.

Furthermore, in disposing of surveyed coal lands within the United States outside of the district of Alaska, the application of an individual to purchase, where met by no opposing claim, was *ex parte* in its nature, and such an applicant might abandon any claim or right alleged to have been initiated by the opening and improving of a mine of coal, and consummate his purchase and make a cash entry under section 2347, Revised Statutes; whether he had opened and improved a mine or not. However, in cases arising under the provisions of sections 2348 *et seq.*, Revised Statutes, where the claimant's right to purchase depends upon the prior opening and improvement of a coal mine or mines, it was and is incumbent upon this Department to enforce the requirements of the law in this particular.

In the case of Esther F. Filer (36 L. D., 360), where it was held that the cleaning out of old coal prospects, at an expense of \$10, was

not the opening and improving of a mine and did not except the land from withdrawal, the Department, on page 361, said:

Whatever else may be involved, the statute clearly contemplates the actual opening of a mine of coal and its improvement as such. Charles S. Morrison (36 L. D., 126, 129). Substantial steps, taken in good faith, looking to the creation of an operating and producing coal mine are essential. What specific work or workings constitute the opening of a mine, or what accomplishes the improvement of a mine when opened, are matters as to which no arbitrary and inflexible rule can be laid down. Each case as it arises must be determined upon the facts disclosed.

In the more recent cases, particularly in the Scofield and Long opinions, *supra*, it has been determined that work done merely for prospecting purposes, and not with the purpose or design of actual mining and producing coal, does not meet the requirements of the statute, and does not serve as a basis for a valid location under the laws applicable to Alaska.

Upon careful consideration of the present record, the Department is convinced that with the exception of the Fremont claim, nothing more than prospecting was done upon several claims here involved prior to November 12, 1906, when the coal lands in Alaska were withdrawn by Executive order from location, entry, or disposition (see *United States v. Midwest Oil Company*, 236 U. S., 459).

The Commissioner's finding that no mine or mines of coal were opened or improved upon any of the claims here involved, with the exception of said Fremont claim, is correct. As to the Fremont claim, the Department fails to find any sufficient evidence of fraud or proof that the claim was not located for the individual use and benefit of the locator, while as hereinbefore set out, a mine of coal was opened and improved prior to withdrawal and such development diligently thereafter continued. Accordingly, in the absence of other objection, patent may issue upon the Fremont claim, and the application, for the reasons stated, must be denied as to all of the other claims and locations herein described.

The decision appealed from is therefore affirmed, as modified.

ALASKA PETROLEUM AND COAL CO. (On Rehearing.)

Decided April 26, 1916.

LANE, *Secretary*:

The Alaska Petroleum and Coal Company has filed a motion for rehearing in the matter of its coal land application 0308 for the Summit and 11 other coal claims situated in the Juneau land district, Alaska. By departmental decision of November 11, 1915 [45 L. D.,

56], this application was rejected as to all claims save one, the Fremont location, for the reason that no mine or mines of coal had been opened or improved upon the several locations.

In support of the present motion two grounds are assigned, viz:

First, that the Secretary erred as matter of law in holding, on the conceded facts of the case, that the original locators and claimants of the coal claims specified, and each and every of them, did not "prior to making such locations or at any other time thereafter and prior to filing notices of said locations, open or improve any mine or mines of coal in and upon any of said tracts of land."

Second, in holding as matter of law that the Act of Congress, approved May 28th, 1908 (35 Statutes at Large, p. 424), was not intended to cure and remedy imperfections in coal locations made in Alaska in good faith and in the interest of the locators, and to require the allowance of such locations and the issue of patents to the locators, notwithstanding imperfections in the locations, in all cases where the locations were made in good faith and in the interest of the locators.

Counsel have submitted a fifty page brief with argument in support of their contentions. With respect to the first specification of error assigned, counsel most earnestly insist that in its recent decisions, including that in the so-called Cunningham case (41 L. D., 176 *et seq.*), and others subsequent, a new ruling and interpretation of the statute as to what constitutes the opening or improving of a coal mine has been formulated and announced and has been applied retroactively to work performed upon claims initiated and asserted long prior to such changed interpretation, to the detriment of this applicant and to the destruction of its rights and property. It is argued that the former decided cases and the long continued practice based thereon established a rule of property upon which Alaska coal locators had a right to rely, and which should have been adhered to in the adjudication of Alaska coal land claims.

The cases singled out and presented as laying down the former rule and practice are the following five decisions: *Watkins et al. v. Garner* (13 L. D., 414); *McGillicuddy et al. v. Tompkins et al.* (14 L. D., 633); *Paire v. Markham* (21 L. D., 197); *Ouimette v. O'Connor* (22 L. D., 538); *Reed v. Nelson* (29 L. D., 615).

It will not be amiss in connection with these cases to examine other early decisions in order to ascertain what work and improvements were, in fact, involved and passed upon, in them, by this Department. April 9, 1877, the Commissioner of the General Land Office considered the matter entitled the Townsite of Coalville, Utah (4 C. L. O., 46, 47). With reference to certain conflicting coal declaratory statements it was there said:

Both were however made on the same day, May 20th, 1875. The one, No. 86, by a party who was not in the possession of the land and who never had been, and by a party who had made no improvements thereon of any kind. The other was made by a party who by himself, his co-owners and grantors, had

been in the actual, continuous and exclusive possession of the premises claimed for a period of more than twelve years, and who had expended upon the claim in actual labor and improvements an amount of forty or fifty thousand dollars.

Good faith appears to have been exercised by the parties in interest in case of D. S. No. 87 in their endeavor to acquire title to property upon which they had expended large sums of money, and of which they had the actual possession.

This same case was before Secretary Schurz January 30, 1878 (Sickels' Mining Laws and Decisions, p. 398), who, while modifying the Commissioner's holding in certain particulars, awarded the land in controversy in accordance with the conclusions reached below, which were governed by the expenditures set forth in the quotation.

In the case of James D. Negus *et al.* (11 L. D., 32), it was held (syllabus):

An applicant for the preference right to purchase coal lands under section 2348, Revised Statutes, must be in actual possession of the land when he applies for such right, and the labor expended and improvements made must be such as to clearly indicate his good faith.

In the case of Bullard *v.* Flanagan (11 L. D., 515, 517), the latter was awarded the land upon the following findings:

That his good faith is shown as a coal claimant from the date of his first offer to file coal declaratory statement, to wit, September 12, 1885, that he commenced to take out coal a few days thereafter and has continued to take out coal in considerable quantities and develop the mine as best he could. That his improvements are worth from \$800 to \$900, thereon. On the other hand Bullard was never on the tract until the 14th day of September, 1885, the day before he offered his first filing. His improvements are not worth to exceed \$550. There is some doubt as to whether his improvements were made for the purpose of development of the mine, or for his own benefit or the benefit of another.

Flanagan's good faith is shown to be superior to that of Bullard's in the premises. * * *

It is clear that Flanagan's possession and improvement of the tract were prior to Bullard's and being followed by proper filing and continued good faith entitles him to the preference under the statute. See Revised Stats., sections 2348, 2349, and 2351.

In the *ex parte* case of Charles H. Ackert (17 L. D., 268, 269, 270), the Commissioner's cancellation of the coal entry as to 40 acres was modified under the following circumstances:

The evidence shows that each of said parties had opened coal mines on the tracts; that Ackert could not operate the mine on his tract economically; that the coal could be taken out through the Phelps tunnel to advantage; that he paid Phelps \$100 for his preference right and improvements. The tunnel in it is about 375 feet long, driven into the coal some 50 feet, at a cost of about \$1,400. The cost of most of this tunnel has been borne by Ackert, and to separate the tracts would almost entirely destroy the value . . .

I am satisfied that he acted in good faith; he has prosecuted the work of development, has expended considerable money in driving a long tunnel into coal, and in preparing for mining, and has paid the government the price for the land, which altogether is only one-half the acreage allowed to one entryman under the coal land law.

In *Walker v. Taylor* (23 L. D., 111), the following language was used:

The decisions of the local office and of your office are in entire harmony upon that question and are adverse to appellant. The testimony has been carefully examined here and not only fails to show that any improvements in the way of opening a mine of coal on the land or of making it more valuable for coal mining purposes were ever made by appellant, but it is also shown both by the testimony of one Lessenger, Taylor's agent, and by numerous witnesses in behalf of protestant, that Taylor was not in actual possession of the land when he filed his application to purchase. The testimony further fails to show that Taylor ever made any discovery of coal on the land, and, as between him and Walker, shows that the latter was in possession when the former filed his application to purchase.

Section 2348 R. S. makes the opening and improving of a coal mine upon the public lands a condition precedent to the preference right of entry therein authorized. It also requires that an applicant to purchase thereunder must be in actual possession of the land (*James D. Negus et al.*, 11 L. D., 32). Section 2351 R. S. provides that "priority of possession and improvement followed by proper filing and continued good faith shall determine the preference right to purchase" in case of conflicting claims.

There were no improvements made upon this land by Taylor prior to filing.

The foregoing cases were all considered and decided long prior to the passage of any of the Alaska coal land acts and particularly prior to the act of April 28, 1904 (33 Stat., 525). The language used clearly indicates that in the opinion of the Department substantial work and actual development were contemplated as being required by the statute, and that mere discovery of coal alone was not sufficient. This line of decisions is reinforced by certain later cases which likewise do not involve the Alaska laws. In the case of *McKibben v. Gablé* (34 L. D., 178, 180, 181), decided by Secretary Hitchcock, he there emphasized the statutory requirement as to the basis of a preference right by saying:

This right arises where any person or persons, severally qualified to enter, have opened and improved any coal mine or mines upon the public lands, and are in actual possession of the same. The right accrues only to the person or persons who have opened and improved the mine or mines, and have the possession thereof. . . .

It is acquired only by opening, improving, and having possession of, a mine or mines of coal on the public lands. In the absence of either of the required conditions, there is no preference-right of entry under the statute. The office of the declaratory statement is to preserve the right, not to create it.

In *Lehmer v. Carroll et al.* (34 L. D., 447, 451), this holding was reiterated in the following terms:

The preference right of entry provided for in section 2348 is not, nor indeed is any right of entry, created, or initiated, by the filing of a declaratory statement under section 2349. Such preference right arises only where a person or association of persons, severally qualified to enter under section 2347, have opened and improved a mine or mines of coal upon the public lands, and are

in actual possession of the same. The object and purpose of the declaratory statement are to give notice of, and to preserve for the period specified in section 2350, a preference right of entry already acquired.

In the *ex parte* case of Esther F. Filer (36 L. D., 360, 361), it was said:

Whatever else may be involved, the statute clearly contemplates the actual opening of a mine of coal and its improvement as such. Charles S. Morrison (36 L. D., 126, 129). Substantial steps, taken in good faith, looking to the creation of an operating and producing coal mine are essential. What specific work or workings constitute the opening of a mine, or what accomplishes the improvement of a mine when opened, are matters as to which no arbitrary and inflexible rule can be laid down. Each case as it arises must be determined upon the facts disclosed.

That decision held that the cleaning out of old coal prospects at an alleged expense of \$10 did not constitute the opening and improving of a coal mine. In that case also it was contended, as it is here, that a change of ruling had been made, and that under the former practice prevailing in the land department the showing made by the applicant was fully sufficient to sustain the application to enter in any *ex parte* case. In that case a 1906 coal land withdrawal had intervened and the claimant was not entitled to enter unless she had acquired rights in good faith prior to the withdrawal, which were existent at the date of the order of withdrawal.

In the case of Thad Stevens *et al.* (37 L. D., 723, 725), it was held that the penetration of a coal bed by a drill hole did not initiate a preference right. The Department said:

The provision of section 2348, Revised Statutes, that those "who have opened and improved . . . any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry," is deemed to have been intended to set a premium upon, or reward in that manner, the opening up of such lands for the potential production of coal therefrom. A bore hole of such diameter as was relied upon in that case would serve no such purpose, obviously, and would but serve affirmatively to demonstrate the presence of the coal, the existence of which must be proven in some appropriate manner in any case, whether the application to purchase and enter be in the exercise of a preference right or otherwise. Of the same character are the several holes drilled upon the land involved in the case at bar, and the effect of the evidence is that no mine of coal was otherwise actually opened. None of the parties, therefore, can be held to have acquired a preference right, and their respective declaratory statements were accordingly of no legal force or effect.

In the case of Conway *v.* Brooks (39 L. D., 337, 339), an expenditure of \$625, in connection with camps, trail, exploration and other work, was claimed. Secretary Ballinger there said:

It appears from the record that while the coal claimants expended certain sums of money on the land embraced in their declaratory statement, in the construction of a trail to and across the land, built a log cabin thereon, and

caused the land to be explored, a mine of coal had not been opened thereon at the time of the filing of the declaratory statement. The only purpose that a declaratory statement will serve is to preserve, for a certain period, a preference right of entry previously acquired by the entering into possession of a tract and the opening and improving of a mine of coal thereon. Without the latter, a coal declaratory statement is an absolute nullity.

In the case of the Anderson Coal Company (41 L. D., 337), a going coal mine was involved, upon which an expenditure of \$9500 had been made at the date of application. The decision in the case of the Carthage Fuel Company (41 L. D., 21), shows that an operating mine was opened at an initial expense of \$27.25, and that within the ensuing four months more than \$5000 were expended in working and improving such mine. These two cases involved the right of an association of four or more persons to purchase approximately 640 acres of coal land upon an expenditure of not less than \$5000 in working and improving the mine upon the land.

It will be noted that section 2348, Revised Statutes, after providing for the preference right of entry of the coal mine or mines opened and improved, concludes with this proviso:

That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

In order to enter 640 acres a \$5000 expenditure in working and improving must be made. This is the only money measure of work definitely prescribed in the statute. Obviously four qualified persons, either individually, or associated in groups of twos, could purchase outright without any antecedent expenditure, the equivalent of 640 acres or could obtain preference rights covering such an acreage by the opening and improving of a mine upon each claim. But to obtain the privilege of a 640 acre purchase and entry under a single claim, four persons must make the \$5000 expenditure. This provision may well be deemed to point out that standard or type of improvements and development work intended by the statute as the basis of a preference right. Working and improving the opened mine or mines of coal are the requirements of the proviso. This does not mean prospecting for other beds or exploiting other outcrops or facing up exposures of coal. After the opening of a mine the next logical step is to work and improve it, to make it productive and useful. This is the object and purpose for which mines are opened and created. This is the "follow through" of the initial effort, if such expression be allowable. By working and improving the mine the claimant demonstrates his "continued good faith," which, coupled with priority of possession and improvements, followed by

proper filing, determines the preference right to purchase under section 2351, Revised Statutes. The opening or improving of a mine, followed by proper filing and continued good faith, exhibited in appropriate development work by the locator, are necessary, but are not shown or proven by what may be done by some other locator upon his claim or by some development or exploration association or company on other lands for the purpose of exploiting and testing the coal field generally.

With this thought in mind the cases relied upon by counsel as establishing the broad, liberal rule contended for may be examined. In the case of *Watkins et al. v. Garner* (13 L. D., 414), the latter in his coal declaratory statement alleged an expenditure of \$45, and that he had exposed a vein of coal by digging into the hill 6 feet, the opening being 8 feet wide and 6 feet high. The evidence satisfactorily showed that Garner had prior possession and improvements followed by proper filing, but it was contended that he had not shown "continued good faith." The testimony showed that prior to his application to purchase, Garner had expended, in labor and improvements on the land, \$400; that he had opened several drifts and exposed valuable veins of coal; that he had done all his means and ability would justify; that he had a farm 24 miles distant and had to earn by work on his farm the means to carry on improvements on the coal land. Thereupon the Department said:

In the opinion of the local officers, the protestants did not show this, and you concurred in that opinion. Garner's "continued good faith" has thus been established by the concurring opinions of the local officers and yourself. It is a question of fact, and it has been held that "when the findings of the local officers have been concurred in by your office, as in this case, they are accepted by the Department, unless clearly wrong." . . .

In the case of *Helen E. Dement* (8 L. D., 639), it is said—

"The Department has held that no fixed rule can be established which shall govern in every case that may arise relative to the good faith of the applicant. It is right and proper to take into consideration 'the degree and condition in life of the entryman' in determining whether the improvements show good faith."

This principle is applicable to entries under the coal land law, or else only the man of ample means can enter coal lands. This is not the policy of the government. These lands are sold at a low price that men of moderate means may purchase them. . . .

But the contention of the plaintiffs, if carried into practice, would tend to promote monopolies.

The "continued good faith" of Garner is an independent fact in the case, and when established, is sufficient to prove his preference right, and therefore to justify the decisions in his favor.

The case of *McGillicuddy v. Thompkins et al.* (14 L. D., 633), involved an asserted preference right; based upon an expenditure of \$50 in labor and improvements, consisting of a shaft house and a shaft four feet square and twelve feet deep sunk in the ground above

a supposed body or vein of coal. At the date of the application the claimant alleged an expenditure of \$8650, \$6650 of which was for machinery, drills, etc., while the expense of sinking a drill hole to the depth of 758 feet was given as \$2,000. The land contained no outcroppings or other surface indications of coal and no coal was disclosed in the shaft described in the filing. The local officers and the Commissioner found that the land was not shown to be valuable for coal, and that the bore hole did not prove the land to be of coal character or warrant its entry as coal land. The Department found it unnecessary to determine these questions but disposed of the matter upon the finding that the claimants were but agents for a disqualified principal and therefore that application could not be allowed.

In *Paire v. Markham* (21 L. D., 197 *et seq.*), the Department said:

It is conceded that he (Markham) did do work within the true boundaries, and did have a discovery of coal there. It is true that it is not an extensive working, and perhaps there is not disclosed therein a vein of coal that would pay for working. Yet the work has been done, and coal has been found by him. All that the law and rules require in opening and improving a coal mine is that "the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant," and not a mere matter of form. . . .

It will thus be seen that Paire did not file his declaratory statement for said land within sixty days from date of possession, as required by section 2349, Revised Statutes. He had possession June 10, and did not file his statement until November 28, in the meantime having "more or less" work done in prospecting for coal, and no discovery of merchantable coal was made by him until after the application to purchase by Markham, and after notice of this proceeding.

The presence of coal on this tract has been demonstrated. Both parties are seeking it for coal. As between these claimants I take it that the quantity of coal cuts but little figure, or the amount of expenditure, provided it is shown they or either of them are acting in good faith. . . .

I am of the opinion that Markham being the prior applicant for the land, and having exhibited good faith in exploring the same, has the prior and better right to purchase.

It is thus shown that Paire did not file his declaratory statement in time and had not disclosed merchantable coal on the land until after the application of Markham. It would thus follow that even without his claimed preference right Markham would necessarily have prevailed.

In the case of *Ouimette v. O'Connor* (22 L. D., 538), Secretary Smith did say that the form of declaratory statement requiring the allegation that a claimant had located and opened a valuable mine of coal need be only substantially followed and was intended for a declarant who had opened a vein of coal. It was further stated that sections 2348 and 2349 did not require that the claimant must have

opened a mine on the land at the time of presenting his declaratory statement. This holding, however, was not a final disposition of the case for the reason that O'Connor was allowed to show whether his predecessor, Bridges, had in fact opened a vein of coal on the land prior to relinquishment. The matter was remanded for further hearing. This same case on review (23 L. D., 243), was modified in one respect, but the decision ordering a further hearing was adhered to.

In the case of *Reed v. Nelson* (29 L. D., 615), it appears that Nelson did actual work that reached coal prior to Reed. Nelson's initial development was meager, consisting of an open cut and shaft disclosing a four foot bed of coal, but he followed that work up with *bona fide* improvements, constructed mainly by his personal efforts, until at the end of seven months he had made improvements of the value of about \$300, consisting of several cuts and shafts and a cabin. He was awarded the disputed tract because of his prior possession and improvements and continued good faith and development work in connection with the opening of coal. This case holds that something more than an actual discovery of coal is essential to initiate a preference right. The opinion states:

That the right to purchase coal lands is initiated by the actual discovery of coal on the land and the performance of some act of improvement sufficient to give notice to the world of an intent to purchase such lands as coal lands. . . .

It appears from Reed's own statements that he filed his declaratory statement for the land in dispute within ten minutes after he learned that it was vacant and before he had performed any act of improvement thereon. No right was initiated by the filing of this declaratory statement, and whatever right he has dates from the time he actually developed coal on the land. . . .

Nelson's right was initiated by the development on May 19, 1897, of a four foot vein of coal on a portion of the one hundred and sixty acres claimed by him; that this development and improvement was promptly followed by the filing of his declaratory statement, which included the tract in dispute; that Reed gained no right by the filing of his declaratory statement on May 3, 1897, before he had discovered or developed coal on this land; and that at the time he initiated his claim by the actual development of coal on the land Nelson's right had already attached to the tract in dispute.

Speaking of the preference right arising under the Revised Statutes, the Supreme Court in *United States v. Forrester* (211 U. S., 399, 403), said:

The mere preference right obtained as the result of taking the steps enumerated in secs. 2348, 2349, Rev. Stat., including the filing of the declaratory statement, is, as described in Sec. 2348, simply "a preference right of entry, under the preceding section, of the mine so opened and improved."

In *United States v. Munday* (222 U. S., 175, 182), the Supreme Court used the following language:

By going upon coal land, opening up a mine, permanently marking the boundaries, and filing and making the notices required under the law one, otherwise

qualified, initiates a claim to the land and may, by further compliance with the law, earn the right to a patent. That the policy of the law stops at this point and leaves him free to assign his location, does not impeach the intent of Congress to confine a locator to a single location.

In ordinary parlance the term "mine" imports more than a mere deposit of mineral or ore. It includes the artificial means and works through which the mineral is reached and removed. In the Century Dictionary, Revised Edition, 1914, the definition of the term mine is given as follows:

An excavation in the earth made for the purpose of getting metals, ores, or coal. Mine work, in metal mines, consists in sinking shafts and winzes, running levels, and stoping out the contents of the vein thus made ready for removal. In coal mining the operations differ in detail from those carried on in connection with metal mines, but are the same in principle. The details vary in coal-mining with the position and thickness of the beds. . . . When the term *mine* is used, it is generally understood that the excavation so named is in actual course of exploitation; otherwise some qualifying term like *abandoned* is required. No occurrence of ore is designated as a *mine* unless something has been done to develop it by actual mining operations. . . . A *mine* (is a place) where coal, ore, or some useful mineral is in the process of exploitation. . . . The term mine is sometimes extended in use to include the ores as well as the excavations.

A deposit of coal is often referred to as a coal bed or a coal seam, or even a vein, but to denominate an unopened and unworked coal bed a "coal mine" is rather anomalous. That Congress was not unacquainted with the fact of actual coal mining operations on the public domain is evidenced by the act of March 3, 1865 (13 Stat., 529), where it was enacted—

That in the case of any citizen of the United States who, at the passage of this act, may be in the business of bona fide actual coal-mining on the public lands, except on lands reserved by the President of the United States for public uses, for purposes of commerce—

such citizen upon proof shall have the right to enter 160 acres to embrace his improvements and mining premises at the price of \$20 per acre. This is the first preference right or preemptive coal land statute. The present law, act of March 3, 1873 (17 Stat., 607), followed eight years later. In that act Congress did not undertake to define in terms what should constitute the opening and improving of a coal mine. The departmental report of February 6, 1872, upon that bill, S. 522, said that the proposed law, if enacted, would protect the right of parties who were then developing these mines or who might thereafter expend their labor and capital in doing so, by giving them a preference right of entry. (See case of John L. Long, 43 L. D., 305, 309, where the report is quoted in full.) The opinion in the Long case, *supra*, was prepared only after a most careful and thorough investigation and consideration of the matter in all the various phases of the questions involved before the Department.

By reason of the foregoing the Department is not persuaded by the presentation of counsel that the early decisions established the rule and practice that discovery of coal, only accompanied by such development as would indicate good faith on the part of the claimant, was sufficient to satisfy the requirements of the law with respect to the opening and improving of a mine of coal as the basis for a preference right. Neither is it convinced that such early holdings or rulings were so uniform and well established as to crystallize into and become a binding rule of property which would serve to fix substantial rights in the locators of the claims involved in the case at bar.

The above is deemed sufficient to answer the line of cases holding to the effect that a long continued and settled interpretation of the law when reversed can not be applied retroactively; for the reason that, in view of the conclusions reached, such decisions are not here applicable. For like reason the numerous objections urged against the opinion of the Department in the Long case also disappear.

Under the second branch of the motion for rehearing it is urged that the consolidation act of May 28, 1908 (35 Stat., 424), is broadly remedial and curative, and as such permits application and entry for defective and imperfect locations. That statute, in part, provides:

That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest prior to November twelfth, nineteen hundred and six, . . . may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands.

It further provides that such persons, their heirs or assigns, may form associations or corporations which may perfect entry of and "acquire title to such lands in accordance with the other provisions of law under which said locations were originally made."

The very basis for the existence of any claim or location in Alaska is the locator's opening or improving of a mine of coal in accordance with the act of 1904. Without this essential foundation no claim or location could arise, and any assertion of location by notice or otherwise would be without legal effect and null and void. The act of 1908 does not purport to create or vitalize a location or claim not already existent. It was created to enable those who possessed locations made in good faith in accordance with prior existing law, but who had, after location, entered into some arrangement or agreement to combine their claims, to perfect such grouping lawfully and to make applications and entry for such consolidated claims and obtain patent under the conditions set forth. Any location lacking the prerequisite element of the opening or improving of a mine

could not be cured and was not to be perfected by reason of that statute.

The Attorney General of the United States, in his opinion of June 12, 1909 (38 L. D., 86-91), after discussing the rules of statutory construction, said:

Under these rules there is little room for the construction of section 1 of the act of May 28, 1908. It is therein "expressed in plain and unambiguous terms" that all persons, their heirs or assigns, who have in *good faith made locations* of coal lands in Alaska, *in their own interest* prior to November 16, 1906, or in accordance with the circular issued by your predecessor May 16, 1907, *may consolidate their claims or locations* by including in a *single claim, location, or purchase* not to exceed 2,560 acres. . . .

It is an elementary rule of construction that such words and phrases as "made locations," "in good faith," "claims," "purchase," and "entry" are used in their technical sense if they have acquired one, and in their popular sense, if they have not. (Endlich on Interpretation of Statutes, sec. 2.) Under the coal-land law, "location," "claim," "purchase," and "entry" have acquired well-defined meanings. (*McKibben v. Gable*, 34 L. D., 178.) A location is made by going upon coal land, opening and developing one or more coal mines thereon, and taking possession of the land. The locator's "claim" is thus initiated. It may be preserved by giving the notice required by law. The "purchase" and "entry" are made at the time of final proof and payment, which, in Alaska, may be four years after the location is made.

Discussing further the said act of 1908 the Attorney General reached the conclusion—

that it was the intent of this legislation to permit such locations to proceed to entry and patent upon the terms and conditions prescribed in said act.

The United States Supreme Court in the case of *United States v. Munday, supra*, stated that a claim is initiated "by going upon coal land, opening up a mine, permanently marking the boundaries, and filing and making the notices required under the law," and in effect holds that the said law, after these statutory requirements have been complied with, leaves the locator "free to assign his location." In other words, the purpose of the act of 1908 was to make legal consolidations of locations which otherwise would have been unlawful, for it had been the consistent holding of this Department that prior to the final proof and certificate upon final entry there could be no combination of locations without the presumption that the locations were made in the interest of those who did not actually open the mine and make the location.

The able and very complete brief filed by counsel for the coal claimants has been given careful consideration, but in view of the foregoing, and particularly in view of the opinion given by the chief law officer of the United States, I do not feel warranted in placing upon the law a different construction from that reached by him or by my predecessor in the Department of the Interior. I must there-

fore adhere to the principles heretofore announced. The decision of the First Assistant Secretary, upon which rehearing is asked, is adhered to, and the motion is denied.

GEORGE W. OZBUN.

Decided April 28, 1916.

PETROLEUM WITHDRAWAL—ACT OF JULY 17, 1914—RESTRICTED PATENT.

Section 9 of the regulations of March 20, 1915, under the act of July 17, 1914, providing for agricultural entries of lands withdrawn, classified, or reported as valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, amended to require that nonmineral entrymen of lands subsequently so withdrawn, classified, or reported, shall be notified of their right to apply for restricted patent therefor under section 3 of said act, and that upon failure to file application for patent within thirty days or to apply for classification of the land as nonmineral, the entry will be canceled.

JONES, First Assistant Secretary:

The Department is in receipt of your [Commissioner of the General Land Office] communication of March 8, 1916, signed by D. K. Parrott, Acting Assistant Commissioner, relating to the case of George W. Ozbun, involving homestead entry 011645, Los Angeles, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 11 N., R. 23 W., S. B. M., calling attention to departmental decision rendered therein December 15, 1915, and making special reference to that part of the decision holding that "claimant will be allowed thirty days in which to elect, and failing therein the entry will be canceled," and suggesting that penalty was probably inadvertently made a part of said decision.

It appears that the lands in question were withdrawn from agricultural entry September 14, 1908, but that they were restored June 22, 1909, and embraced in petroleum reserve No. 24, by Executive order under date of December 16, 1911. The entry was made October 27, 1910, and on December 14, 1914, final three-year proof was submitted, but final certificate was withheld because the lands had been included in petroleum withdrawal aforesaid.

Your decision recites that:

You will notify claimant that patent, if issued, will contain a reservation of the oil and gas deposits to the United States in accordance with the act of July 17, 1914, unless, within thirty days, there is filed in your office an application for classification of the lands as nonmineral, together with a showing, preferably the sworn statements of experts or practical miners, of the facts upon which is founded a knowledge or belief that the land applied for is not valuable for mineral. In the event that such application for classification is filed, and same is denied, a hearing will be allowed, if applied for, at which the burden of proof will be upon the claimant to show that the land is not mineral in

character. Should, however, the claimant fail to take any action within the time allowed, you will, upon proper payments being made, issue final certificate with the reservation of the oil and gas deposits under the act of July 17, 1914.

The Department affirmed your action, but construed the law further to mean that it was optional with claimant whether he should take patent as pointed out by you or suffer cancellation of his entry.

Section 3 of the act of July 17, 1914 (38 Stat., 509), provides:

That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, *may, upon application therefor*, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor.

This section clearly defines that a person who upon "making satisfactory proof of compliance with the laws under which such lands are claimed" may receive such patent for the land "upon making application therefor." Upon the other hand there appears therein, expressed or implied, no authority of law for the issuance of patent except upon application.

Departmental regulations under the act of July 17, 1914, *supra*, section 3 thereof, recites that:

This act in many respects resembles that of March 3, 1909 (35 Stat., 844), which provides for the protection of the surface rights of entrymen upon lands subsequently classified, claimed, or reported as coal lands, and also, that of June 22, 1910 (36 Stat., 583), authorizing certain forms of agricultural entries and selections on withdrawn or classified coal lands. The general instructions under these acts of September 7, 1909 (38 L. D., 183); September 8, 1910 (39 L. D., 179); May 23, 1912 (41 L. D., 30); and June 14, 1912 (41 L. D., 89), may be followed, so far as applicable, in matters of practice and procedure not specifically covered by these regulations.

It seems, therefore, that in the absence of expressed recital in the regulations governing the perfection of entries under the act of July 17, 1914, *supra*, the "general instructions" not inconsistent under the acts mentioned "may be followed."

Thus by reference to circular of instructions of September 7, 1909 (38 L. D., 183), it is seen, section 2, that:

All persons who, in good faith, locate, select, or enter, under the nonmineral laws, lands which are, subsequently to the date of such location, selection, or entry, classified, claimed, or reported as being valuable for coal, *may elect*, upon making satisfactory proof of compliance with the laws under which they claim, to receive patents upon their location.

And in section 3 thereof:

The claimant may, after determination at final proof that the lands are chiefly valuable for coal, *elect to receive* patent with the statutory reservation, provided, of course, proof of compliance with the law in other respects is satisfactory.

Again, in section 6, after reciting that claimant shall be entitled to patent upon satisfactory final proof, without reservation, unless there is satisfactory evidence that the lands were known to be coal before the submission of final proof, when a hearing will be ordered, and if such facts be shown at the hearing then—

the entry shall be canceled, unless the claimant shall prove that he was at the time of the initiation of his claim in good faith endeavoring to secure the land under the nonmineral laws, and not because of its coal character, in which event he shall be permitted *to elect to receive* patent with the reservations prescribed in the statute.

And section 7, as amended (41 L. D., 358), reads:

But no coal declaratory statement or application to purchase . . . will be received until the nonmineral claimant *has elected* to take a patent containing the prescribed reservation.

These regulations were made in pursuance of the statute itself, which declares "that any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which are subsequently classified . . . may, if he shall *so elect*, . . . receive a patent therefor.

Upon consideration of what is believed a proper construction of this act, no good reason is apparent why the instructions thereunder may not be followed, in so far as they are applicable in the practice and procedure governing in the case under consideration. The Department finds no authority of law for the issuance of a patent, in this and like cases, to a claimant who has failed to express his willingness to receive it. Moreover, it has said in the case of the State of California *et al.* (44 L. D., 27), syllabus:

The land department is without authority to issue limited patent under the act of July 17, 1914, for lands embraced in a school indemnity selection by the State of California, upon waiver by the transferee of the State of all right to the oil deposits therein, unless the State shall have first consented to the issuance of such restricted patent.

Accordingly, for your guidance in the future, section 9 of the regulations, under the act of July 17, 1914 (38 Stat., 509), providing for agricultural entries on phosphate, oil, and certain other mineral lands (44 L. D., 32), is hereby amended to read as follows:

Nonmineral claimants who are or may be affected by withdrawals or classifications made, or which shall be made, subsequent to their locations, selections, entries, or purchases, upon submission of satisfactory proof of compliance with the laws under which they claim, unless the withdrawal be revoked or the classification set aside prior to the issuance of patent, or unless they show that the lands embraced in their claims are in fact nonmineral, shall be entitled to the patent authorized to be issued by section 3 of the act upon the filing of an application therefor. Such claimant will be notified of his right to such a patent, and upon failure to file within thirty days his application therefor or to apply for a classification of the land as nonmineral, the entry will be canceled.

INSTRUCTIONS.

April 28, 1916.

SMALL HOLDING CLAIM—ACT OF APRIL 28, 1904—PROOF.

No proof of settlement claims will be hereafter accepted, with a view to procuring relinquishment thereof by the Atlantic and Pacific Railroad Company under the act of April 28, 1904, until by examination in the field such claims shall be found to be valid.

SELECTIONS UNDER THE ACT OF APRIL 28, 1904—APPROXIMATION.

In making selections under the act of April 28, 1904, in lieu of lands hereafter relinquished for the benefit of settlement claims, the Atlantic and Pacific Railroad Company will be required to select an area in compact form approximating that relinquished.

JONES, *First Assistant Secretary*:

The Department has recently had under consideration certain selections and small-holding claims under the act of April 28, 1904 (33 Stat., 556), and you [Commissioner of the General Land Office] were instructed to proceed with examinations in the field to determine the relative quality of the selected and the base lands.

Said act reads as follows:

That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

SEC. 2. That the Secretary of the Interior shall, as soon as may be after the passage of this act, cause inquiry to be made of all lands so held by settlers, and shall cause the holdings of such settlers to be surveyed, and on receiving such relinquishments or deeds shall at once, without cost to the settlers, cause patents to issue to each such settler for his or her holdings: *Provided*, That not to exceed one hundred and sixty acres shall be patented to any one person, and such recipient must possess the qualifications necessary to entitle him or her to enter such land under the homestead laws.

SEC. 3. That any fractions of any such sections of land remaining after the issuance of patents to the settlers as aforesaid shall be subject to entry by citizens the same as other public lands of the United States.

The instructions of August 2, 1904 (33 L. D., 156), under this act, provide that proof of the settlement claims may be made by corroborated affidavit executed before the local officers or before any officer authorized to take homestead proofs. No publication of notice of intention to offer proof is required, nor are such claimants required to pay any fees or commissions, as the law provides that patents

shall issue without cost to the settler. It appears that under this procedure a number of such claims of doubtful merit have been allowed. To obviate such results as to future cases it is directed that no such proof be hereafter accepted until by examination in the field it shall be found that such claim is valid.

It will be observed that the law permits the railroad company to relinquish an entire section although only a portion thereof may be embraced within such settlement claim. Heretofore, the company has been permitted to make its selections by smallest regular subdivisions, although an entire section may have been conveyed to the Government because a small portion thereof was claimed by a settler. It is believed that this privilege heretofore accorded to make selection of areas less than that relinquished is broader than justified by the law, which provides that the company shall be "entitled to select in lieu thereof and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

As to selections hereafter made under this act the company will be required to select, in lieu of land relinquished for the benefit of such settlement claim, an area in compact form approximating that relinquished. For example, if 160 acres be relinquished for the benefit of any one settlement claim, a selection in lieu thereof must be in compact form approximating that area, and if an entire section be relinquished because of a settlement claim for a portion thereof, then in such case the selection in lieu thereof must be of like area in compact form. This rule will be applied as to selections in lieu of any lands hereafter reconveyed by the company under said act.

CHARLES M. FOSTER.

Decided April 28, 1916.

TIMBER AND STONE ENTRY—APPRAISAL—PRICE.

The submission by a special agent of a tentative appraisal of lands within nine months from the tender of a sworn statement therefor by an applicant under the timber and stone act, which appraisal was not approved and filed in the local office within that period, does not constitute an official appraisal, and the applicant is entitled, under section 19 of the timber and stone regulations, to make entry of the lands within thirty days after the expiration of the nine months' period, at the price, not less than \$2.50 per acre, specified by him in his application as the reasonable value thereof.

JONES, *First Assistant Secretary:*

Charles M. Foster has appealed from the decision of the Commissioner of the General Land Office rendered August 8, 1914, in the above-entitled case, requiring additional payment of \$770 in connec-

tion with timber and stone entry 07969, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 18, and lot 4, Sec. 20, T. 30 N., R. 41 E., W. M., Spokane, Washington, land district.

It is insistently urged upon this proceeding by counsel for appellant that the timber and stone act of June 3, 1878 (20 Stat., 89), under which this entry was made, provides that the price of \$2.50 per acre, fixed by said act, is the maximum, as well as the minimum price, and that, therefore, the regulations of the Department providing for the appraisement and sale of timber and stone lands for a greater amount than specified by Congress, go beyond the scope of the act. This contention is not sound and no discussion is deemed necessary with respect thereto, the Department in the case of Lizzie Lawson (Seattle 01931), decided February 29, 1916, holding to the contrary [44 L. D., 585].

It is further contended that the land was not in fact appraised within nine months from the date the original sworn statement was filed in this case, and that claimant having paid the sum of \$410, the value of the land and timber as estimated by him in his original sworn statement, within thirty days after the expiration of the nine months period, is, therefore, entitled to purchase the land without further additional payment, in accordance with paragraph 19 of the timber and stone regulations of August 22, 1911 (40 L. D., 238), revised and reapproved January 2, 1914 (43 L. D., 37). For the purpose of disposing of the latter contention it is necessary to briefly set out the various steps taken in the case.

Foster filed his original sworn statement December 23, 1912, valuing the land and timber at \$410. The described land was examined by a special agent and on June 5, 1913, within nine months from the date Foster filed, the special agent submitted a tentative appraisal to the Chief of Field Division, which appraisal was suspended upon the recommendation of the examining special agent in order that the land might be further examined with respect to its suspected mineral character. No notice was given the local officers or appellant within nine months from date the original sworn statement was filed in the local office, that the land had been examined by the Field Service.

October 17, 1913, within thirty days after expiration of nine months from date the original sworn statement was filed Foster tendered \$410 in payment of the purchase price and the local officers issued their final receipt therefor. No objection at that time appearing, on October 22, 1913, notice for publication issued setting January 14, 1914, as the date for making proof.

The Chief of Field Division, on November 12, 1913, returned his copy of the notice for publication to the local officers requesting that

final certificate be withheld until field examination had been made, or report submitted. January 14th, on the date set, Foster made proof.

January 21, 1914, the Chief of Field Division filed in the local office a favorable report by a mineral inspector, clear-listing the land in so far as its mineral character was concerned and the report was accompanied by the tentative appraisal which was submitted to the Chief of Field Division June 5, 1913, by the special agent, as hereinbefore stated.

January 21, 1914, was the first notice that the local officers received that the land had theretofore been appraised, which notice was more than three months subsequent to the date Foster made payment of the \$410. Basing their action upon the favorable report of the mineral inspector, and as no appraisal had been filed in their office within nine months from the date the sworn statement was filed, the local officers issued final certificate on the entry.

In the first place it is significant, and likewise of sufficient importance to make mention of the fact, that the tentative appraisal submitted by the special agent June 5, 1913, has not as yet been approved by the Chief of Field Division, register or receiver, or by the Commissioner of the General Land Office, as required by paragraph 18 of the timber and stone regulations cited.

Paragraph 19 of the Regulations, provides:

Unless the land department, as hereinbefore provided, or otherwise, as directed by the Secretary of the Interior, shall appraise any lands applied for under these regulations within nine months from the date of such application, the applicant may, without notice, within 30 days thereafter, deposit the amount, not less than \$2.50 per acre, specified in his application as the reasonable value of the land and the timber thereon, with the receiver, if appraisement has not been filed prior to such deposit, and thereupon will be allowed to proceed with his application to purchase as though the appraisement had been regularly made. The failure of the applicant to make the required deposit within 30 days after the expiration of the nine months' appraisement period will terminate his rights without notice.

In the case of Felicita Carolina de Bauw (40 L. D., 132, 134), the Department laid down the rule that—

Although section 19 of the regulations of November 30, 1908, gives an applicant under the timber and stone act, in cases where the government fails to appraise the land within nine months from the date of application, the right to purchase the land applied for at his appraised price (provided this is not less than \$2.50 per acre), nevertheless, if the government appraisal at a higher price is actually filed before the applicant exercises such right, he must thereafter pay such higher price, notwithstanding the expiration of the nine months period.

In the case of Andrew Holte (43 L. D., 428), the Department held:

Under paragraph 19 of the timber and stone regulations an applicant under the timber and stone act is entitled to purchase, in the absence of an appraise-

ment of the land within nine months from the tender of his sworn statement, at the price named in his sworn statement; and in the absence of fraud or misrepresentation there is no authority for an appraisal or reappraisal of the land after the application has been or is entitled to be allowed.

The record in the case at bar reveals the fact that the Government appraisal of the tracts sought to be entered by Foster was not filed in the local office within nine months from the date he filed his original sworn statement nor was the appraisal filed during the thirty days immediately following the expiration of the nine months' period, prior to date of payment of the purchase price by Foster. The Department, therefore, is of the opinion that the described land had an unappraised status October 17, 1913, when appellant made payment.

Under authority of the cases cited and in accordance with the right exercised by Foster under paragraph 19 of the timber and stone regulations, the Department concludes that claimant is entitled to patent without further payment, in the absence of fraud, misrepresentation, or other valid objection.

The decision appealed from is accordingly reversed, without precluding the Commissioner from proceeding against the entry on the ground of fraud or misrepresentation should he, upon further consideration or investigation, find sufficient reason therefor.

RELIEF OF DESERT LAND ENTRYMEN—ACT OF MARCH 4, 1915.

INSTRUCTIONS.

[No. 471.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, May 9, 1916.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The following instructions are for your guidance in disposing of cases under Sec. 5 of the act of March 4, 1915 (38 Stat., 1161), and are to be considered as supplementing, not superseding, the regulations embodied in Circular No. 399 of April 13, 1915 [44 L. D., 56].

Applications for relief should ordinarily be transmitted with your returns for the month during which filed. If the entry is involved in contest proceedings the application for relief should be transmitted by special letter. All elections to purchase should be transmitted with your returns for the month during which filed.

If the entryman files his election to purchase under paragraph 3 of the act within the sixty days allowed by regulations contained in Circular No. 399, he must tender therewith a payment sufficient in

amount to cover the purchase price of the land involved in the entry at the rate of 50 cents per acre. .

If the entryman has previously made the final payment of \$1.00 an acre in connection with a former final proof under the desert land laws in which case the relief is sought, and the same has been deposited and accounted for as earned, he may elect to have 50 cents per acre of said former payment applied in connection with his election to purchase under paragraph 3 of the act and the remainder of 50 cents per acre credited on the payment of 75 cents per acre required at the time the final proof is filed, and pay the additional sum of 25 cents per acre in cash.

Initial payments should be reported on the "Schedule of Allowances" for the months the moneys are applied, in accordance with Circular No. 438 of September 28, 1915. In cases where final proof has been offered and credit of 50 cents per acre of the amount previously covered into the Treasury is requested, the payments should be reported on the above mentioned schedule under dates of the filing of the elections, and reference should be made on said schedule to the numbers of the receipts which issued for such payments, and in the "Remarks" column to the dates the moneys were applied. Receipt numbers and amounts involved together with a reference to letters from this office granting relief should be noted on elections to purchase.

Where the payment of 50 cents per acre is made at the time the election to purchase is filed, relief having been granted by this office, such payment must be applied by the Receiver on the date of the filing of the election. Should an election to purchase be filed in a case where relief has not been granted and the initial payment tendered the moneys must be held by the Receiver as "Unearned Moneys" until action is had by this office on the application for relief, and the moneys should then be applied or returned to the applicant in accordance with the action had by this office. Should credit for moneys previously covered into the Treasury be requested before relief is granted, and relief should subsequently be granted, such payment should be reported on the "Schedule of Allowances" under date of the letter from this office granting relief. In no instance should the initial payment be reported on the "Schedule of Allowances" prior to the granting of relief by this office.

In cases where the applicants elect to perfect their entries in the manner required of a homestead entryman such elections should not be reported on the "Schedule of Allowances." Upon issuance of final certificates in such cases the final entries, designated as "DL (Final) 3-4-15 Residence," showing date, serial number and area only should, however, be reported on the schedule in question.

When credit is allowed for final purchase money previously covered into the Treasury and the balance remaining is not sufficient to cover the final purchase money due and an additional amount is collected to cover such deficiency, the receipt issuing for the remainder should show the number of receipt which originally issued for the final purchase money and the amount credited thereon.

The only moneys authorized to be collected in connection with final proofs offered in support of entries perfected under paragraph 2, are testimony fees in cases where the proof is taken in your office, and the purchase price where the entry is perfected under the commutation provisions of the homestead law. Where entries are perfected under paragraph 3, and the final proof depositions are taken in your office, the usual fee for transcribing the testimony may be charged, as in ordinary desert land proofs, and in addition, the balance (\$.75) of the purchase price should be collected. No commissions may be charged under any circumstances, and no testimony fees unless the proof is taken at your office.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, May 9, 1916:

ANDRIEUS A. JONES,
First Assistant Secretary.

**DESERT LAND ENTRIES IN CHUCKAWALLA VALLEY—ACT OF
APRIL 11, 1916.**

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 13, 1916.

REGISTER AND RECEIVER,
Los Angeles, California.

SIRS: Your attention is directed to an act entitled "An act to exempt from cancellation certain desert-land entries in Riverside County, California" (Public, No. 49), approved April 11, 1916, which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no desert-land entry heretofore made in good faith under the public-land laws for lands in townships four and five south, range fifteen east; townships four and five south, range sixteen east; townships four, five, and six south, range seventeen east; townships five, six, and seven south, range eighteen east; townships six and seven south, range

nineteen east; townships six and seven south, range twenty east; townships four, five, six, seven, and eight south, range twenty-one east; townships five, six, and sections three, four, five, six, seven, eight, eighteen, and nineteen, in township seven south, range twenty-two east; township five south, range twenty-three east, San Bernardino meridian, in Riverside County, State of California, shall be canceled prior to May first, nineteen hundred and nineteen, because of failure on the part of the entrymen to make any annual or final proof falling due upon any such entry prior to said date. The requirements of law as to annual assessments and final proof shall become operative from said date as though no suspension had been had. If the said entrymen are unable to procure water to irrigate the said lands above described through no fault of theirs, after using due diligence, or the legal questions as to their right to divert or impound water for the irrigation of said lands are still pending and undetermined by said May first, nineteen hundred and nineteen, the Secretary of the Interior is hereby authorized to grant a further extension for an additional period of not exceeding two years.

With the exception of sections 1 and 2, 9 to 17 and 20 to 36, inclusive, T. 7 S., R. 22 E., S. B. M., the act of April 11, 1916, applies to the same lands as those described in the acts of June 7, 1912 (37 Stat., 130), and March 4, 1913 (37 Stat., 1008).

On April 4, 1916 [45 L. D., 24], the Department held that the effect of the acts of June 7, 1912, and March 4, 1913, was to suspend the statutory period on desert land entries, embracing lands described therein, from the date of the act or acts applicable thereto until May 1, 1915, and to extend the statutory period accordingly.

The act of April 11, 1916, expressly provides that the law as to annual assessments and final proof shall become operative from May 1, 1919, as though no suspension had been had, and this provision has the effect of suspending the statutory period on desert land entries made prior to April 11, 1916, for lands described in said act from April 11, 1916, to May 1, 1919.

The rule to be observed in determining when annual and final proofs become due in connection with desert-land entries embracing lands described in the acts of June 7, 1912, and March 4, 1913, is to exclude the period from the date of the act or acts applicable thereto, until May 1, 1915, and to extend the statutory period accordingly.

A similar rule should be observed with reference to the act of April 11, 1916, by excluding the period from April 11, 1916, to May 1, 1919, and extending the statutory period accordingly.

The act of April 11, 1916, also provides that if desert land entrymen are unable to procure water to irrigate the lands described in said act through no fault of theirs, after using due diligence, or the legal questions as to their right to divert or impound water for the irrigation of said lands are still pending and undetermined by May 1, 1919, the Secretary of the Interior is authorized to grant a further extension for an additional period of not exceeding two years.

The granting of a further extension of time for a period of not exceeding two years after May 1, 1919, is dependent upon conditions existing in the future and which can not be foreseen, and regulations under this portion of the act of April 11, 1916, if necessary, will be issued in due time.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved May 13, 1916:

ANDRIEUS A. JONES,

First Assistant Secretary.

ISOLATED TRACTS OR LOTS IN IMPERIAL COUNTY, CAL.—ACT OF
MARCH 3, 1909.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, May 13, 1916.

REGISTER AND RECEIVER,

Los Angeles, California.

SIRS: Annexed hereto is a copy of the act of Congress approved March 3, 1909 (35 Stat., 779), entitled "An act to provide for the sale of isolated tracts of public land in Imperial County, Cal.," which directs that all lots situated in 26 specified townships and which are 10 chains or less in width and lie between or abut on "entered or patented" lands, shall be sold at private sale for cash, at such price and under such regulations as the Secretary of the Interior shall prescribe, but not at less than \$2.50 an acre. The proviso to said act accords to any entryman or owner of such entered or patented tracts a preferred right to buy "one-half" of all such lots as abut on lands held under his entry, or owned by him, within six months after the time when the Secretary shall fix the price of such tracts. Many of said lots, however, are shown by the plats to abut on more than two entered or patented tracts, and the impossibility of selling one-half of such a lot to each of three or more different parties is self-evident. For this and other sufficient reasons disclosed by careful analysis of the act, the administration of its literal provisions can not be undertaken. But the apparent spirit and purpose of said proviso was to give a preference right of purchase to those entrymen and owners of lands adjoining any particular lot who are best entitled thereto under the special facts of each case. With this in view, and under the authority conferred by said act, the following rules and regulations are prescribed for the sale of said lots:

PRICE OF LOTS AND PREFERENCE-RIGHT PERIOD.

(1) The price of all lots sold under said act is hereby fixed at \$10 per acre, and the period of six months within which any preference right of purchase may be asserted by application begins to run from the date of these regulations. If not so asserted, such preference right will be forfeited. You will supply the press with copies of these regulations as a matter of news, and give to them such further publicity as may be possible without incurring expense.

APPLICATIONS BY PREFERENCE-RIGHT CLAIMANTS.

(2) Any person, company, or corporation entitled to or claiming a preference right under said proviso may file in your office an application to purchase all of any lot which, on any of its boundary lines, adjoins or abuts on land entered or owned by the applicant. Such application must be sworn to before some officer qualified to administer oaths and using a seal, and must (a) identify by proper description the applicant's entered or owned land lying contiguous to that sought to be purchased; (b) give the names and post-office address, so far as known to the applicant, of the entrymen or owners of all the other lands contiguous to the tract-sought; and (c) allege what improvements are upon the land desired, by whom they were made, and their relation to the applicant's use of his adjoining land. Every such application must be accompanied by, and contain reference to, a sketch plat of the lot or lots sought, showing with reasonable detail the location of canals, ditches, fences, cultivation, and other prominent improvements on and close to the lot applied for. If applicant be an entryman of adjoining land, he must give the serial number of his entry. If he be the owner of adjoining land, he must file with his application a duly authenticated abstract or certificate of title showing his ownership. As said act had no purpose to enlarge any grant to the State of California or to any railroad company, no preference right will be recognized in either the State or such a company, but this will not prejudice the right of an "owner" who is a transferee of the State, or of a railroad company. No preference right application by only one entryman or owner will be considered unless he shall be the sole party entitled to apply, or unless the others who are so entitled shall waive or forfeit their rights.

In cases where a preference right to purchase a lot is claimed by two or more parties, joint application by them all may be made; or any number of them less than all may make a joint application and file therewith written waivers of right by the others. If more than one application be made for the same tract by parties separately claiming preference of purchase, such right will be awarded to the

applicant most equitably entitled thereto under all the facts and circumstances of the particular case. It is suggested to the interested parties that joint application will simplify and expedite the sale and patenting of lots and enable the parties to subdivide the property among themselves in such manner and proportion as they may privately determine. Every joint application must be sworn to by each party thereto and must otherwise substantially conform with the requirements hereinabove made respecting an application by a single party.

No special form of application will be prescribed. No application filed within the six months' period will be "allowed" by you, but all applications will be given their appropriate serial numbers and forwarded to this office with your regular returns. When so transmitted, each application must bear a memorandum by you relating it to said act of March 3, 1909, and reference to that act will also be made on your monthly schedules.

PAYMENTS.

(3) All preference-right applications, individual or joint, must be accompanied by the price of the land applied for, computed at \$10 per acre. The money will remain in the unearned account pending final action on the application by this office.

DISPOSAL OF LOTS AFTER PREFERENCE-RIGHT PERIOD.

(4) All of said lots which may remain unsold at the end of said six months period, and for which no preference-right application is then pending, will thereafter be subject to sale under said act of March 3, 1909, to the first applicant therefor.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

AN ACT To provide for the sale of isolated tracts of public land in Imperial County, California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the allotted portions of townships thirteen, fourteen, fifteen, and sixteen south of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen and of fractional township seventeen south of ranges fifteen and sixteen, all east of San Bernardino meridian, which are ten chains or less in width and lie between or abut on entered or patented lands, shall be sold at private sale for cash, at such price and under such regulations as the Secretary of the Interior shall prescribe, but not at less than two dollars and fifty cents an acre: *Provided,* That any entryman or owner of such entered or patented tracts shall have a preferred right to buy one-half of all such lots as abut on lands held under his entry or owned by him within six months after the time when the Secretary shall fix the price

of such tracts, and this preferred right shall not prevent such entryman or owner from buying all of any such abutting lots as may remain unsold at the expiration of said six months.

Approved March 3, 1909. (35 Stat., 779.)

RULE OF PRACTICE 46 AMENDED.

CIRCULAR.

[No. 473.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 16, 1916.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: In order that claimants may be allowed to submit final proof on an entry at any stage of contest proceedings, Rule of Practice 46 is hereby amended to read as follows:

RULE 46. The pendency of a contest will excuse the submission of final proof on the entry involved until a reasonable time after the disposition of the proceedings, but final or commutation proof may be submitted at any stage thereof. The payment of the final commissions or purchase money, as the case may be, should be deferred until the case is closed, when, if the contest is dismissed and the proof is found satisfactory, claimant will be allowed 30 days from notice within which to pay all sums due and furnish a nonalienation affidavit, upon receipt of which the proper form of final certificate will issue.

In such cases the fee for reducing the proof testimony to writing must be paid at the time the proof is submitted.

The final proof should be retained in the local office until the record in the contest case is forwarded to the General Land Office, but will not be considered in determining the merits of the contest, though it may be used for the purpose of cross-examination during the trial.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

RIGHTS OF WAY THROUGH UNSURVEYED LANDS.

CIRCULAR.

[No. 479.]

DEPARTMENT OF THE INTERIOR,
Washington, May 24, 1916.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

DEAR MR. COMMISSIONER: Regulation 53 of the circular approved June 6, 1908 (36 L. D., 567, 586), governing rights of way over public

lands and reservations for canals, ditches, reservoirs, etc., under section 4 of act of February 1, 1905 (33 Stat., 628), is hereby amended to read as follows:

Rights of way through unsurveyed land.—Maps showing reservoirs, canals, water plants, etc., wholly upon unsurveyed lands, will be received and acted upon in the manner hereinbefore prescribed for surveyed lands.

Very truly yours,

Bo SWEENEY,
Assistant Secretary.

TOLES v. NORTHERN PACIFIC RY. CO. ET AL.

Decided November 23, 1915.

SETTLEMENT ON UNSURVEYED LAND—CONFLICTING RAILROAD SELECTION.

Where settlement was made upon unsurveyed land, and it developed on survey that part of the land, including the subdivision upon which the building in which the settler resided was located, was embraced in a prior selection by the Northern Pacific Railway Company under the act of March 2, 1899, such fact does not defeat the settler's rights to the remaining tracts covered by his settlement claim.

CONFLICTING DECISION OVERRULED.

Departmental decision in *Toles v. Northern Pacific Ry. Co. et al.*, 39 L. D., 371, overruled in so far as in conflict.

JONES, *First Assistant Secretary*:

Ada L. Toles has appealed from the decision of the Commissioner of the General Land Office, dated April 8, 1915, rejecting her homestead application for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, T. 44 N., R. 2 E., B. M., Coeur d'Alene, Idaho, land district.

The material facts in this case are that on July 5, 1905, the plat of survey of this township was filed in the local office and on the same day the appellant filed her homestead application for the two subdivisions named and the adjacent SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of the same section, alleging settlement on September 26, 1901. On May 16, 1911, the homestead application was rejected as to the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said Sec. 26, for conflict with the selection filed on June 21, 1901, by the Northern Pacific Railway Company, under the act of March 2, 1899 (30 Stat., 993).

In the decision appealed from the Commissioner held that inasmuch as it was shown that Toles had settled upon the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, upon which was situated her cabin and cultivated land, and that tract had already been selected by the railway company, such settlement was unauthorized and could not be included with the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$.

The Commissioner further held that the selection by the Northern Pacific Railway Company of the two tracts here under consideration,

filed on May 27, 1904, under the act of March 2, 1899, *supra*, was an intervening adverse claim lawfully initiated prior to the attachment of any right of Toles.

It is clearly shown by this record that Toles's settlement, initiated long prior to survey of the land in the field, was extended to the two subdivisions in dispute prior to their selection by the railway company. Notice of her claim as to these tracts was given by the construction of a trail over the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and a brush fence around a small pasture on the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, with a trail leading to it. As held by the Commissioner her good faith in making settlement is not seriously questioned. It therefore remains only to be determined whether, as held by the Commissioner, the prior selection by the railway company of the subdivision upon which her house and cultivated ground are situated rendered all, or any part, of her settlement claim invalid. It will be observed that she settled upon and originally applied for 160 acres of land in square form.

In the case of *Daniels v. Northern Pacific Railway Company* (43 L. D., 381), the Department has had occasion to consider and determine the nature of the right acquired by a selection or location of unsurveyed public land, and reached the conclusion that such selections and locations do not segregate the lands covered thereby, nor are they such appropriations thereof as will prevent others from initiating claims thereto, subject to the rights of prior claimants; in other words, a railway selection like the one here under consideration gave to the company a preference right to the land as against junior claimants, such right to be exercised in due season after the filing of the plat of survey in the local office by adjustment to the lines of that survey.

Applying the principle announced in the *Daniels* case to this, it must be held that Toles made a valid settlement upon the 160 acres originally applied for by her, and that although her right to 80 acres of the land has yielded to the superior claim of the railway company, her right to the two tracts under consideration was not affected and is superior to the junior selection by said railway company.

Any ruling made in *Toles v. Northern Pacific Railway Company, et al.* (39 L. D., 371), in conflict herewith, is hereby overruled, and the decision appealed from is reversed.

TOLES v. NORTHERN PACIFIC RY. CO. ET AL.

Motion for rehearing of departmental decision of November 23, 1915, 45 L. D., 92, denied by First Assistant Secretary Jones May 31, 1916.

Coddington v. Northern Pacific Ry. Co. et al.

Decided December 31, 1915.

SETTLEMENT ON UNSURVEYED LAND—CONTIGUITY.

A settlement right extends to every part of all legal subdivisions embraced in the claim, and if the settler is compelled to yield a portion of his claim to a prior right, his claim, even though his settlement was made prior to survey of the land, may be recognized and protected as to the remainder, notwithstanding the elimination of the land covered by the prior claim renders his claim noncontiguous.

JONES, *First Assistant Secretary*:

Thomas Coddington and James Calkins each appealed from decision of May 5, 1915; Coddington, in so far as said decision rejected his homestead application as to SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, for lack of contiguity, and Calkins, from that part of said decision which ordered a hearing between him and Coddington respecting priority of right on NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, T. 44 N., R. 22 E., B. M., Coeur d'Alene, Idaho.

Township plat of survey was filed in the local office July 5, 1905, on which day Coddington presented homestead application for SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, same township and range, alleging settlement on or about September 30, 1902, which the local office rejected for conflict with prior selection by the Northern Pacific Railway Company and homestead applications of other parties. There were also involved at that time selections by the State of Idaho. All these claims, except two of the railway company and one of Calkins, have been eliminated.

June 21, 1901, the railway company filed its List 61 under act of March 2, 1899 (30 Stat., 993), for the unsurveyed SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22. On the same day it filed its List 62 under act of July 1, 1898 (30 Stat., 597, 620), for NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23. May 27, 1904, the railway company filed its List 135 under act of March 2, 1899, *supra*, for SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15. July 31, 1905, the company filed new Lists 61, 62, and 135 to describe the selected lands, in accordance with the plat of survey.

November 25, 1908, the railway company's List 62 for NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, was canceled and entry of Calkins was allowed for that and other land.

July 1, 1909, Coddington's homestead application was rejected as to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, for conflict with the company's selection List 61; as to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, May 18, 1911, for the reason that said tracts were not contiguous, Coddington's application was rejected. June

21, 1911, Coddington filed a new homestead application including the same four tracts as his former one, alleging settlement September 30, 1902, and continuous residence thereon ever since, stating that he had constructed a habitable house on the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, had expended the sum of \$2,000 or more in buildings and improvements. The local office rejected this application for conflict with the railway company's List 61 and homestead entries 01330 and 07592.

The Commissioner found that the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, are included in a valid selection by the Northern Pacific Railway Company June 21, 1901, List 61, and were not subject to settlement or entry at the date Coddington claims to have settled, and rejected his second homestead application for that reason. The two remaining tracts in sections 15 and 23 were not contiguous and Coddington's improvements being on section 23 the Commissioner rejected his homestead application as to the tract in section 15, on authority of Douglas Randall (11 L. D., 367).

In view of the Department, this ruling of the Commissioner was error. In *Akin v. Brown* (15 L. D., 119) and *B. F. Bynum* (23 L. D., 389) it was held that a homestead entry embracing noncontiguous tracts may be equitably confirmed where the noncontiguity arises through the necessary cancellation as to one of the subdivisions covered thereby on account of a prior adverse claim thereto. In *Daniels v. Northern Pacific Ry. Co.* (43 L. D., 381, 384), quoting from *Henry Bruns* (15 L. D., 170, 171), the Department held:

The filing of this scrip upon unsurveyed land does not segregate the land covered thereby, nor is it such an appropriation of the tract as will prevent others from initiating claims thereto, upon the same principle that more than one settlement may be made and more than one declaratory statement filed for the same tract.

These inchoate rights are all subject to the right of the prior claimant, and, if he fails to perfect his claim after survey within the time required by law, it is then subject to the right of the next claimant in order of priority.

A settlement right and a settler's possession extend to every part of all legal subdivisions of his claim. If compelled to yield, as in this case, to a prior preference right, his right is no further cut off than the prior one necessitates. This should be equally applicable to a long pending settlement on lands before reached by the surveys and opened to entry. Coddington claims to have made settlement in 1902. He has expended a large sum in apparent good faith and should be protected so far as possible. The railway selection, by List 135, was not made of the tract in section 15 until May 27, 1904, long after Coddington's settlement. Should he lose the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, on which the Commissioner allowed a hearing, he would still have something of his settlement claim left. *Reed v. St. Paul, Minneapolis and Manitoba Ry. Co.* (41 L. D., 375, 377).

The Commissioner's decision is modified to leave the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, within Coddington's application as pending, his right being clearly superior to that of the railway company.

The appeal of Calkins asserts error in the decision because his homestead entry was commuted by him and final certificate issued December 28, 1912, more than two years before decision of the Commissioner herein, ordering a hearing between Coddington and Calkins. The record here shows that Coddington had at least two acres cleared and that he cultivated land on the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23. He claims that he had more than three acres but Calkins admits he had at least two acres. There should have been a hearing between Coddington and Calkins before he was permitted to make final proof. Coddington's claim of prior settlement on that tract was pending in the land department and the order of a hearing between those claimants, while made late by the Commissioner, is merely an order for hearing of adverse claims which were pending from the very moment the plat was filed in the local land office and prior to Calkins's entry.

The decision respecting this tract is therefore affirmed and cause remanded for further proceedings.

CODDINGTON v. NORTHERN PACIFIC RY. CO. ET AL.

Motion for rehearing of departmental decision of December 31, 1915, 45 L. D., 94, denied by First Assistant Secretary Jones May 31, 1916.

EVEN THORSTENSON.

Decided February 29, 1916.

PRICE OF LANDS WITHIN RAILROAD LIMITS—REPAYMENT.

Where a purchaser of lands in an even-numbered section within the primary limits of a railroad grant paid double-minimum price therefor, as required by departmental decisions and instructions, he is not entitled to repayment of the excess paid by him over and above the minimum price.

JONES, First Assistant Secretary:

Even Thorstenson has appealed from the decision of the Commissioner of the General Land Office of July 30, 1913, holding for rejection his application filed April 17, 1913, for repayment of alleged excess of purchase money in connection with his cash entry made October 22, 1888, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9, T. 17 N., R. 18 E., North Yakima, Washington, land district.

This land is situated within the primary limits of the grant to the Northern Pacific Railroad Company, as fixed by filing map of definite location, July 6, 1882, and also within the limits of withdrawals for said company on general route, which became effective February 21, 1872. It appears, however, that the railroad company executed a relinquishment of its right thereto, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

The present application is filed under section 2 of the act of March 26, 1908 (35 Stat., 48), which provides:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payment to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

Thorstenson paid \$2.50 per acre for said land under departmental requirements, and now claims that \$1.25 per acre should be returned him for the reason that the Department was without authority to charge more than \$1.25 per acre therefor.

Section 2357 of the Revised Statutes provides "that the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress shall be \$2.50 per acre."

It is contended that this statute does not fix the price of lands within the granted limits of a railroad and subsequently relinquished by it, or for any reason excepted from the operation of the grant, at \$2.50 per acre.

The question presented is not a new one, the Department having held, in a long line of decisions dating from 1884, that land of this class must be disposed of at \$2.50 per acre (Clark *v.* Northern Pacific Ry. Co., 3 L. D., 158; Atlantic & Pacific Railway Co., 5 L. D., 269; William D. Baker, 12 L. D., 127; Daniel Campbell, 22 L. D., 673; Romona Lopez, 29 L. D., 639; instructions of March 2, 1910, 38 L. D., 468, and Walter Hollensteiner, 38 L. D., 319). See also regulations prescribed and cases decided involving the construction of kindred statutes providing for the sale of timber and stone lands (20 Stat., 89; departmental regulations revised and approved January 2, 1914, 43 L. D., 37; Virinda Vinson, 39 L. D., 449), coal lands (section 2347, Revised Statutes; departmental regulations of April 12, 1907, 35 L. D., 665; William G. Plested *et al.*, 40 L. D., 610); isolated tracts (37 Stat., 77; departmental regulations of December 18, 1912, 41 L. D., 443).

The Department is unwilling to overturn its many decisions in this connection, and long-established construction of such statutes.

Indeed such construction by the Department is, in itself, controlling in this case even if sufficient authority were lacking—

on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or existence of a power, weight should be given to the usage itself, even when the validity of the practice is the subject of investigation. *United States v. Midwest Oil Company*, 236 U. S., 459, 472. See also *St. Paul Railway Co. v. Donohue*, 210 U. S., 21, 36.

The doctrine of *stare decisis*, well known and recognized in this Department, likewise forbids such action (*Rancho Corte de Madera del Presidio*, 1 L. D., 232, 239; *Rees v. Central Pacific R. R. Co.*, 5 L. D., 277; *Taylor v. Yates*, 8 L. D., 279, 281; *State of Ohio*, 10 L. D., 394, 396; *Smith Hatfield*, 17 L. D., 79; *Knight v. Hoppin*, 18 L. D., 324, 325; *Bender v. Shimer*, 19 L. D., 363, 365).

Not only has this Department recognized that it is largely controlled by its former decisions, but the Supreme Court of the United States has invariably declined to disregard and overturn the construction placed upon statutes by the executive departments charged with their execution, "except for cogent reasons and unless it is clear that such construction is erroneous" (*United States v. Johnston*, 124 U. S., 236, 253), or "unless a different one is clearly required" (*Hawley v. Diller*, 178 U. S., 476, 488).

The Supreme Court of the United States, in the case of the *United States v. Midwest Oil Co.*, *supra*, page 481, in speaking of a long-continued practice of this Department in connection with certain withdrawals, said: "Its (Congress's) silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."

The decision of the Commissioner is affirmed.

EVEN THORSTENSON.

Motion for rehearing of departmental decision of February 29, 1916, 45 L. D., 96, denied by First Assistant Secretary Jones July 22, 1916.

ELMER D. RICHARDS.

Decided May 3, 1916.

SOLDIERS ADDITIONAL RIGHT—ASSIGNMENT.

An assignment of a soldier's additional right, or the affidavits accompanying the same, must clearly and specifically describe and identify the particular right assigned; and a general bill of sale by a soldier entitled to an additional right, covering all of the personal goods and chattels of which he may be possessed, can not be recognized as an assignment of such right.

JONES, First Assistant Secretary:

Elmer D. Richards, as assignee of Newell L. Burr, Henry Johnson and Frank Mahrtens, sole heir of Henry Mahrtens, has appealed to the Department from decision of the Commissioner of the General Land Office of February 9, 1916, adhering to his former action of January 24, 1916, and December 8, 1915, requiring assignment of another heir of Henry Mahrtens to support the application of said Richards to enter under sections 2306 and 2307, Revised Statutes, the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 30, T. 8 N., R. 2 E., B. H. M., 40 acres, Bellefourche, South Dakota, land district. The applicant tendered assignment of the right of Burr for 8.68 acres, of Johnson for 6.57 acres, and of Mahrtens for 6.21 acres. The assignor in the Mahrtens case claimed as the sole heir of the soldier entryman and attached to his assignment and affidavits a certified copy of a bill of sale to sustain his claim that Henry Mahrtens, in Presque Isle, Michigan, December 4, 1909, assigned to Frank Mahrtens, his son, the soldiers' additional right in question. Said bill of sale is upon a printed blank and reads as follows:

KNOW ALL MEN BY THESE PRESENTS, That I, Henry Mahrtens of the Township of Belknap, in the County of Presque Isle and State of Michigan, of the first part, for and in consideration of the sum of One Dollar and services rendered, lawful money of the United States, to me paid by Frank Mahrtens, my son, of the same place, party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said party of the second part, his executors, administrators or assigns, all the personal goods and chattels of which I am this day possessed and may come into possession of before my death belonging to me and now or hereafter to become in my possession at the Township of Belknap, said County and State, or wherever the same may be situated.

TO HAVE AND TO HOLD the same unto the said party of the second part, his executors, administrators and assigns, Forever, and the said party of the first part for himself, his heirs, executors and administrators, does covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of said property, goods and chattels hereby made, unto the said party of the second part, his executors, administrators and assigns against all and every person or persons whatsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this fourth day of December one thousand nine hundred and nine.

HENRY MAHRTENS. (SEAL.)

Signed, sealed and delivered in presence of—

KATIE SOMMER.

WM. SCHMIDT.

It appears from the record that Frank Mahrtens is not the sole heir of his father, Henry Mahrtens, but that Barbara C. Petit, daughter of Henry Mahrtens, resides at 547 Fisher Ave., Detroit, and is a sister and joint heir with Frank Mahrtens, residing at Belknap Township, Presque Isle County, Michigan. Under this state of facts the question presented upon this appeal is whether the general and indefinite bill of sale heretofore set forth by quotation is sufficient to transfer the soldiers' additional right in question to Frank Mahrtens and eliminate his sister and co-heir, Barbara Petit, from any interest therein. The Commissioner of the General Land Office has held by the decisions from which appeal is taken that applicant must furnish assignment from Barbara Petit, in that the bill of sale so general in its terms does not transfer the soldiers' additional right to Mahrtens and eliminate his sister from all interest therein. The bill of sale was executed December 4, 1909, Henry Mahrtens died August 1, 1914, and the assignment of the claim by Frank Mahrtens was made June 25, 1915. In disposing of this case the Commissioner says:

This office, however, requires in an assignment of a soldiers' additional right that it be specifically described, and that its basis, both as to military service and original entry, be mentioned either in the assignment or affidavit accompanying the same in order that this office may pass upon the validity of the right.

In view of this holding by the land department and of all conditions and circumstances disclosed by the record, the Department is of the opinion that there is no error in the decision of the Commissioner requiring an assignment of her right by Barbara Petit, joint heir with Frank Mahrtens of the claim of their father Henry Mahrtens. No other question is presented upon this appeal nor considered at this time by the Department. The decision appealed from is affirmed.

HEIRS OF JACOB M. DAVIS.

Decided May 10, 1916.

HOMESTEAD—DEATH OF ENTRYMAN—ABANDONMENT BY WIDOW—RIGHT OF HEIRS.

Where the widow of a deceased homestead entryman fails to assert her statutory rights of succession to the entry of her deceased husband, and

just prior to the expiration of the life time of the entry the heirs, who for nearly four years succeeding the death of the entryman complied with the requirements of the law, in order to save the entry submit final proof thereon, the widow will be considered to have abandoned her rights and patent should issue to the heirs.

JONES, First Assistant Secretary:

Leander M. Davis, son of Jacob M. Davis, deceased, appealed from decision of June 2, 1915, requiring the widow of the deceased homesteader to make the final homestead affidavit.

April 20, 1905, Jacob M. Davis made homestead entry for SW. $\frac{1}{4}$, Sec. 27, T. 4 N., R. 23 E., W. M., The Dalles, Oregon, subject to act of June 17, 1902 (32 Stat., 388). April 8, 1912, five-year proof was submitted by the son, one of the heirs of the entryman, which the local office transmitted to the Commissioner without action. The proof showed that entryman lived on his claim to his death, June 22, 1908. The improvements are a house, entire claim fenced, 10 acres cultivated, and the land has been used by the son for grazing purposes since his father's death. The original entry paper showed that entryman then had a wife. The Commissioner ruled that final homestead affidavit must be made by the wife and the proof was sufficient for its acceptance. He directed the local office to issue certificate in name of the wife, should she make the final affidavit, and if evidence was submitted that there was no widow, certificate should issue to the heirs of the entryman.

The son appealed and therein stated:

We don't know where the widow is as we have had no word from her for about 4 or 5 years. She left my father 2 or 3 yrs. before he filed on his claim, but they never had a divorce or separation through the courts. I do not think she has any rights to the claim as she did not even come to see him in his final sickness that caused his death and she had been asked to come. I will appeal to the Secretary of the Interior if you will inform me how to do it.

In consideration of this statement the Department, October 18, 1915, addressed a letter to the son, allowing him thirty days from receipt of letter to submit affidavit of himself, corroborated by two witnesses who knew facts, stating whether the widow was still living, if not, where she died and the reasons why he instead of the widow undertook to complete the entry; when his father was abandoned by the wife and under what circumstances and where she now resides. October 28, 1915, the son executed and transmitted to the Department an affidavit stating:

That my father's third wife Bell H. Davis, left my father two or three years before he filed on his homestead entry. And she refused to come to see him during his last sickness and death, though she was invited to come. She made no effort to make final proof on my father's claim. I waited until the seven

years required by law was up, in which to make final proof, or almost up. I had but three days grace when I made final proof, spending my own money for witnesses and other expenses, so that my two sisters could have their share as well as myself. If my stepmother had made any effort to have proved up, I would not have hindered her in any way, or tried to secure it for the heirs. She left my father to help take care of her brother's family, and she now lives at Clarksburgh, West Virginia, so my sister Flora G. Beck wrote me, who lives at Kelso, Wash.

No effort has been made by the widow, if living, to claim the land and the entry was about to expire when the son offered the proof.

It was held in the case of *Eliza Willis* (22 L. D., 426) that:

It is not deemed necessary or proper that the rights of the widow or the facts respecting her alleged abandonment of her husband should be the subject of adjudication at this time. It is sufficient to find that the land has been earned from the government and that the equitable title has thereby vested in some rightful party. . . . It has been held, furthermore, that the widow must seasonably exercise her right "so that a stranger or third party shall not be injured or materially prejudiced by any laches of her own." *Orvis v. Banks*, 2 L. D., 138. . . . The heirs stand next to her in the order of statutory succession and if she should die before the exercise of her right they inherit, not from her, but from the entryman. In principle, the right should, by parity of reasoning, pass to the heirs, in the event of failure of the widow, from any cause, to exercise it. It is important to keep in mind the true relation of the widow to the entry, that is to say, that no right can pass through her. Her incapacity to make final proof resulting from death, or for instance, from lunacy after interdiction, appears to me not to be distinguishable, in law, in so far as it affects the heirs, from neglect or refusal to exercise the right.

In other words, the homestead entry does not fail because the widow neglects to make final proof.

It was also held in *Phillipina Adam et al.* (40 L. D., 625, 626) that:

The widow, by reason of priority in the order of succession is entitled to avail herself of the statutory right to the exclusion of all others, and obtain a patent in her own right. But, if she be dead, the heirs may then complete the entry for their sole benefit. No valid reason can be urged why renunciation by the widow of her statutory right, or disqualification that would prevent her from completing the entry, would not be as effective to pass the right to the heirs and leave them free to perfect the claim, as if she were dead.

It appears that the widow here had done nothing to earn title to this land. She separated from her husband before he made the entry, taking up her residence elsewhere. The full life of the entry has elapsed. The son, on behalf of himself and two sisters, offered final proof at the last moment before expiration of the entry. Whether it be true that the widow refused to visit the husband in his last illness, it is clear that she asserts no claim to the land, though entryman died June 22, 1908, four years before the submission of final proof by the son. It is a clear case of abandonment by the widow, and no rea-

son appears to require a formal renunciation by her. Title to the land has been fully earned, duties to the Government being carried on by one of the heirs for the benefit of all.

In view of the Department, the final proof should be accepted, if unobjectionable in any other respect, and patent issued to the heirs. The decision is reversed.

STATE OF LOUISIANA.

Decided May 10, 1916.

SWAMP LANDS—SELECTION LISTS.

The reference in paragraph 3 of the instructions in the case of State of Louisiana, 32 L. D., 270, 277, to selection lists which had theretofore been presented, "which purported to include, and should have included, the whole of the swamp lands" in a given township, contemplates cases wherein the provisions of paragraph 6 of the circular of September 19, 1891, 13 L. D., 301, requiring a certificate that selection lists cover the full and final claim of the State to lands under the swamp land acts in the townships specified and that the State waives all claim under said acts to lands in said townships not selected, have been complied with, and is not applicable where the State has not been required to file the certificate mentioned.

JONES, *First Assistant Secretary:*

The State of Louisiana has appealed from the decision of the Commissioner of the General Land Office of November 20, 1915, rejecting its application filed September 30, 1915, to have sections 98, 100, 102, 104 and 106, T. 10 S., R. 10 E., Louisiana Meridian, identified by the Secretary of the Interior as swamp and overflowed lands enuring to it under the grant made by acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519), now sections 2479, 2480 and 2481 of the Revised Statutes.

It appears that the State filed various swamp land selection lists of lands in this township, in addition to the list now under consideration, on the following dates: August 14, 1850; July 31, 1850; January 6, 1853; November 25, 1859, and July 19, 1902.

Examination of the records of the General Land Office discloses that the list filed July 19, 1902, has never been acted upon, and the State has not filed nor been called upon to file a certificate in connection therewith reciting that the land selected represents the full and final claim of the State to lands in this township under the swamp land acts, as required by section 6 of the circular of September 19, 1891 (13 L. D., 301).

The decision of the Commissioner is based upon paragraph 3 of the instructions of the Department contained in the case of State of Louisiana (32 L. D., 270, 277), which is as follows:

In townships which have been heretofore surveyed and on account of which lists of swamp lands have been presented which purported to include, or should have included, the whole of the swamp lands in that township, no further selections will be considered, it not being the intention of the Department to afford opportunity to the State under a more liberal ruling, designed for the purpose of facilitating the adjustment of pending selections, to reopen its grant, so far as the same may have been adjusted under former practice, by presenting new selections, and in this connection your attention is particularly invited to paragraph 6 of circular of September 19, 1891 (13 L. D., 301), and you will see that the directions therein given are strictly complied with.

Paragraph 6 of the circular of September 19, 1891, *supra*, is as follows:

Before final action is taken on the claim of a State for swamp lands in place or cash or land indemnity, a certificate should be required of a duly authorized agent of the State reciting that the lands selected in each and every township involved in the selection list constituting the claim represents the full and final claim of the State to lands under the swamp-land acts in the said townships, and that the State waives all claims or rights, under the said acts, if it have any, to all other lands not selected in the said townships.

The reference in paragraph 3 of the instructions above quoted to selection lists which had theretofore been presented, "which purported to include, or should have included, the whole of the swamp lands" in a given township, contemplates cases wherein the provisions of paragraph 6 of the circular of September 19, 1891, *supra*, had been complied with and is not applicable where the State has not been required to file the certificate mentioned.

It follows, therefore, that the instructions of the Department upon which the Commissioner's decision is based have no application in this case, and the same is, therefore, remanded for further consideration by him.

BERTHA M. BIRKLAND.

Decided May 12, 1916.

ENLARGED HOMESTEAD—ADDITIONAL ENTRY BY WIDOW—RESIDENCE.

Where the widow of a deceased homestead entryman makes an additional entry under section 3 of the enlarged homestead act as amended by the act of February 11, 1913, it is incumbent upon her to make full compliance with the requirements of the homestead law in the matter of residence, as well as cultivation and improvement, upon either the original or additional entry.

JONES, *First Assistant Secretary*:

Bertha M. Birkland, widow of Henry O. Birkland, deceased, has appealed from the decision of the Commissioner of the General Land Office, rendered December 6, 1915, requiring her to show, by corroborated affidavits, how much time she has resided upon her additional homestead.

It appears that Henry O. Birkland made homestead entry No. 012125, on September 30, 1910, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 31, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32, T. 21 N., R. 16 E., M. M., Lewistown, Montana, land district. He died June 4, 1911.

It further appears that his widow, Bertha M. Birkland, made homestead entry No. 030242, additional thereto, on December 7, 1914, for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 32, same township and range; that she submitted three-year proof on both entries July 23, 1915, and that final certificate issued July 26, 1915.

It is insisted that, under the state of facts here shown, residence on either the original or additional homestead entry is not required, in order that title to the additional may be earned. The additional entry in this case was made under the act of February 11, 1913 (37 Stat., 666), amending section 3 of the enlarged homestead act. Said section 3, as amended, reads as follows:

That any homestead entryman of lands of the character herein described, upon which entry final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres.

It will be seen that as a condition precedent to the additional entry, it must appear that final proof has *not* been made. This clearly contemplates a showing of residence additional to that which would be required upon the original entry. In the cases of Lillie E. Stirling (39 L. D., 346), and the Heirs of Susan A. Davis (40 L. D., 573), it was clearly held that the widow, heir, or devisee, may make additional entry under the enlarged homestead act, if they have continued to reside upon, cultivate, and improve the land embraced in the original entry, since the death of the entryman.

The widow, heir, or devisee of the deceased entryman takes the right of additional entry possessed by him, but all the requirements of the law must be complied with, which includes residence as well as cultivation and improvements. It is well settled that such widow, heir, or devisee is not required to continue to reside upon the original entry; only cultivation and improvement is necessary, but, when an additional entry is proposed, then complete compliance with the

requirements of the law, which includes residence on either the original or additional entry, must be shown. See instructions of August 3, 1915 (44 L. D., 234).

The decision appealed from is accordingly affirmed.

FRANK GRIFFITH.

Decided May 12, 1916.

TIMBER AND STONE—PRICE OF LAND—REAPPRAISEMENT.

Where an applicant to purchase under the timber and stone act protests the appraisement of the land and applies for reappraisement, he is not entitled, under paragraph 19 of the timber and stone regulations, upon failure of reappraisement within nine months from application therefor, to purchase at the price named in his sworn statement, but must await the reappraisement and pay the price fixed thereby.

JONES, *First Assistant Secretary:*

August 17, 1911, Frank Griffith made timber and stone sworn statement for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 6, and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 7, T. 35 S., R. 13 W., Roseburg, Oregon, land district. Appraisement of said lands in the sum of \$1740 was made and submitted within the required nine months.

February 9, 1912, claimant filed an application for reappraisement of said lands, accompanied by \$100 deposited to cover the costs of the same as required by the regulations.

November 21, 1912, the local officers notified claimant that nine months from the date of transmittal of said application for reappraisement to the chief of field division had expired, and therein further said that:

Your attention is called to paragraphs 19 and 22 of timber and stone regulations. Copy herewith. If you fail to pay the price designated in your application, not less than \$2.50 per acre, within thirty days after the expiration of nine months allowed to make reappraisement, your rights will terminate without notice. Should you make said payment within the time allowed, and before reappraisement is received, you will be entitled to return of the amount deposited for reappraisement.

November 26, 1912, in accordance with said notice, claimant deposited with the local officers \$400, the price he had fixed in his sworn statement. The date for final proof was fixed and advertised for February 13, 1913, at which time said proof was submitted, and on February 25, 1913, final certificate was issued thereon, against which the chief of field division filed protest in the local office.

April 12, 1913, the Commissioner of the General Land Office held the certificate for cancellation upon the ground that it was error to accept payment until reappraisement had been made, and it was

said that in the event the decision became final the reappraisement would be made and action had under the regulations. Claimant has appealed therefrom to the Department.

Paragraph 19 of the regulations provides that unless the appraisalment of the lands applied for is made within nine months from the date of such application—

the applicant may, without notice, within thirty days thereafter, deposit the amount, not less than \$2.50 per acre, specified in his application as the reasonable value of the land and the timber thereon, with the receiver, if appraisalment has not been filed prior to such deposit, and thereupon will be allowed to proceed with his application to purchase as though the appraisalment had been regularly made. The failure of the applicant to make the required deposit within thirty days after the expiration of the nine months' appraisalment period will terminate his rights without notice.

Paragraph 22 of said regulations provides that:

Upon the receipt of a protest against appraisalment and application for reappraisalment conforming to the regulations herein, the register and receiver will transmit such protest and application to the chief of field division, who will cause the reappraisalment to be made by some officer other than the one making the original appraisalment. The procedure provided herein for appraisalment will be followed for reappraisalment, except the latter, if differing from the former, must, to give it effect, be approved both by the chief of field division and the register and receiver, or, in case of disagreement between them, by the Commissioner of the General Land Office.

It would seem that the register and receiver interpreted the clause in said paragraph 22, wherein it is said that "the procedure provided herein for appraisalment will be followed for reappraisalment," to mean that if the "reappraisalment" is not made within nine months from the date of notice to the chief of field division, the applicant has a right to pay the price fixed by him in his application, the same as he has in case the original appraisalment is not made within nine months from the date of filing of said application.

The claimant urges that such is the meaning and intent of said clause, and that under the notice of the register and receiver to him of November 21, 1912, he was practically compelled to deposit the \$400 and submit final proof on the date fixed therefor by the local officers or suffer the termination of his rights under his sworn statement; that he has been to an expense of over \$200 in making proof under said notice, which will be an entire loss to him in case the final certificate is canceled.

An examination of the timber and stone regulations (40 L. D., 238), leads to the conclusion that the local officers erred in giving the notice of November 21, 1912, to claimant, pending a reappraisalment of the land under his application. It is true that nine months from the date of the filing thereof, and from its reference to the chief of

field division, had expired, but there is no requirement in the regulations relating to "reappraisements" that they should be made within nine months. The language in paragraph 22, relied upon therefor, would appear to simply relate to the method and details of reappraisement provided in paragraphs 15 to 18, inclusive, of said regulations.

Moreover, under paragraph 23:

When a reappraisement is finally effected, the register and receiver will note the reappraised price on their records, and at once notify the applicant that he must, within thirty days from the date of notice, deposit with the receiver the amount fixed by such reappraisement for the sale of the land, or thereafter, and without notice, forfeit all rights under his application.

It is evident that in framing the regulations of November 30, 1908, under the timber and stone act and the revision thereof August 22, 1911, there was no purpose of allowing an applicant under said act, who had obtained an order for reappraisement of the land, to secure the same except through paying the reappraised price. See paragraph 34 of said regulations.

It is unfortunate that claimant should have been put to inconvenience and expense by the erroneous notice of the local officers, but the action had can not be allowed to stand. The decision appealed from holding the final certificate for cancellation is affirmed. The reappraisement will be made and action had under the regulations.

HARPER v. GIFFORD.

Decided May 16, 1916.

INTERMARRIAGE OF HOMESTEADERS—ELECTION—CONTEST.

While election under the act of April 6, 1914, designating which entry the husband and wife elect to reside upon in case of intermarriage of a homestead entryman and a homestead entrywoman, should be filed prior to discontinuance of residence upon either tract or within a reasonable time thereafter, yet failure to so file such election is not of itself sufficient ground for contest where the right in fact exists.

JONES, *First Assistant Secretary*:

Patti G. Gifford, now Renzema, has appealed from decision of January 7, 1916, by the Commissioner of the General Land Office, holding for cancellation her homestead entry, made under the name of Patti G. Gifford on November 29, 1912, for the NE. $\frac{1}{4}$, Sec. 34, T. 1 S., R. 20 E., Bozeman, Montana, land district, upon the contest of George Harper.

The contest was filed May 5, 1915, alleging:

That the said Patti Gordon Gifford has abandoned her residence upon the said land for more than one year last past; that there are no fences or buildings

upon said land; that the said abandonment is not cured by any permit or leave of absence; and that the said Patti Gordon Gifford has intermarried with John Renzema; that no affidavit of election of place of residence has been filed by either, as required by act of Congress of April 6, 1914, relating to rights of homesteaders who intermarry; and that final proof has not been made.

Hearing was had under date of July 12, 1915, and the local officers found in favor of the contestant, which was affirmed by the Commissioner, as above stated.

It appears from the record that the entrywoman had complied with the law in connection with her homestead entry up to the date of her marriage on March 19, 1914; that she then left the land and went to live with her husband upon his homestead entry, and her house, which had been erected upon her land was removed to his claim; that her husband made entry December 5, 1911, and had complied with the law respecting residence and cultivation up to the time of the hearing; that notice of election under the act referred to was filed May 24, 1915, to make the family residence upon the homestead entry of the husband.

The said act of April 6, 1914 (38 Stat., 312), reads as follows:

That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry: *Provided*, That the provisions hereof shall apply to existing entries.

It will be seen that the above law specifically states that its provisions shall apply to then-existing entries. The entrywoman had complied with the homestead law with reference to her entry for more than one year prior to her marriage, and prior to leaving the land, as had also her husband, with reference to his entry. The law had not been finally enacted at that time, but the legislation was in process, and the parties had learned from newspaper reports that it would probably be enacted. The entrywoman was not in default at the time the bill became law, and she is clearly entitled to its benefits, unless some of the requirements of the act have not been complied with. Much is made of the fact that a formal, written election by the husband as to the tract upon which the family residence would be maintained had not been filed at the time of the contest.

The regulations under the act (43 L. D., 272) provide that the election of the husband must be supported by the affidavits of both parties, showing the facts upon which the right of election is claimed, but no time is stated within which such election must be filed. Undoubtedly it was contemplated that such election should be

filed prior to discontinuance of residence upon either tract or, at least, within a reasonable time thereafter. However, mere failure to file such election is not of itself sufficient ground of contest, if the right of such election exists. It is shown by the record that the parties did not learn of the regulations concerning the filing of election until the early part of 1915, when the husband went to the land office on some other business; but at that time he could not procure the necessary blanks; and, also, on account of the delicate condition of his wife, the preparation of the affidavits was further delayed.

Under the circumstances appearing herein, the failure to file election prior to the contest is not considered a controlling feature of the case. Furthermore, the record fails to show that there was default in the matter of cultivation at the time of the filing of the contest, and no allegation of failure to comply with law in that respect was made, unless the general charge of abandonment be considered broad enough to cover it.

There was no cultivation during the year 1914, but in the spring of 1915, an area of about 22 acres was plowed. It is clear that there could be no actual abandonment, if the land was being claimed and cultivated at the time of the contest; and, so far as the record shows, such were the facts.

The decision appealed from is, accordingly, reversed.

ADNAH M. KIMPTON.

Decided May 16, 1916.

SOLDIERS' ADDITIONAL—LAND CLASSIFIED AS MINERAL.

The classification of land as mineral in character under the act of February 26, 1895, does not prevent soldiers' additional location thereof, provided it be satisfactorily shown that the land is in fact nonmineral and subject to such location.

JONES, *First Assistant Secretary*:

Adnah M. Kimpton, assignee of the right of David Reed, alias John David, appealed from decision of December 16, 1915, denying his application, under section 2306, Revised Statutes, to enter the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, T. 15 N., R. 1 W., M. M., Helena, Montana, 40 acres, based on an assignment of 40 acres of Reed's right to him, on the ground that the land has been classified under the act of February 26, 1895 (28 Stat., 683), as mineral in character.

No question is made of the validity of the soldiers' additional right. It has been adjudged valid, and a tract of land patented

under it. Proceedings for location of the right are admitted by the Commissioner to be regular.

The land is within primary limits of grant to the Northern Pacific Railway Company and was classified as mineral by the Geological Survey under the act of February 26, 1895, *supra*, which classification was approved by the Secretary of the Interior July 3, 1912. April 7, 1915, Kimpton's application was filed at the local office, which was referred to the Commissioner, who allowed Kimpton thirty days from service of notice to furnish corroboration of his nonmineral affidavit by affidavits of qualified persons familiar with the land from personal inspection. Such affidavit was furnished, and the Commissioner referred the matter to the Geological Survey which reported, December 9, 1915, that nothing in the proofs furnished indicates any but a superficial examination of the land had been made and did not demonstrate either the mineral or nonmineral character of the tract. The Commissioner therefore rejected the application.

It is insisted that classification under the act of February 26, 1895, *supra*, affects the character of the land only as between the railway company and the Government. Former decisions of the Department uphold that contention. In *Luthye et al. v. Northern Pacific R. R. Co.* (29 L. D., 675), it was held that:

It is apparent that the chief purpose of the act was to determine speedily and finally what lands, within the limits of the grant to the Northern Pacific Railroad Company, in certain land districts in the States of Montana and Idaho, were excepted from the operations of the grant by reason of their mineral character. A selection or filing by the railroad company, before or after the passage of the act, would make no difference, since all selections and filings by or for the railroad company, upon lands classified under said act as mineral lands, were to be canceled.

In *St. Paul, Minneapolis and Manitoba Ry. Co.* (34 L. D., 211), the Department held that:

The act of February 26, 1895, under which this classification was made, was designed to separate the mineral lands from the nonmineral lands for the purpose of aiding a speedy adjustment of the Northern Pacific land-grant. While it is true that the classification made by said commissioners when approved was final as to the Northern Pacific Railroad Company, it did not prevent such disposal of the lands as may be proper on a subsequent showing as to their character, the effect of the return by the mineral land commissioners being likened to the return of mineral lands made by the government surveyor.

In *State of Idaho v. Northern Pacific Ry. Co.* (37 L. D., 135, 138) the question arose as to the right of the railway company to select land classified as mineral under the act of February 26, 1895, *supra*, in lieu of land relinquished to the United States under the act of March 2, 1899 (30 Stat., 993), and the Department held, in substance,

that the classification by the commissioners under the act of 1895, *supra*, was merely to aid in speedy administration of the grant, but does not make the land mineral in fact or exclude it from nonmineral appropriation on proper proofs of nonmineral character.

It is obvious that land of mineral character could not be selected by the Northern Pacific Railway Company under the act of March 2, 1899, *supra*, but, if not of mineral character, it could be. The State of Idaho contended that the railway company was estopped to deny the mineral character of the land by the classification under the act of 1895. The Department held otherwise, that:

it clearly authorizes the company to select land within the area classified under the act of February 26, 1895, *supra*, as freely as in any other portion of the territory to which its right of selection thereunder is restricted.

The selection was allowed.

Other holdings of similar effect are in Northern Pacific Ry. Co. *v.* State of Idaho (37 L. D., 68); Northern Pacific Ry. Co. *v.* Mann (33 L. D., 621, 622); Northern Pacific Ry. Co. *v.* Ledoux (32 L. D., 24).

The holder of a soldiers' additional right has as much right to locate any unreserved, nonmineral tract as has a homesteader or a railway company selector. It follows necessarily that Kimpton had right to enter this land under the additional homestead right assigned to him, provided it is in fact of nonmineral character. The supposed mineral classification was only for the purpose of facilitating administration of the Northern Pacific Railway Company's grant and no wise affected the real character of the land, nor barred question by anyone else than the railway company. The proofs to be submitted by one seeking to enter the land are simply those which a homestead applicant would have to submit, and differ in no respect therefrom. It appears to the Department that the affidavit of Kimpton, verified by two neighbors, that the land shows no mineral indications and that there has been no mineral discovery is sufficient to overthrow the mineral return of a surveyor of public lands.

The decision is therefore reversed and, if no other objection appears, the entry will be allowed.

REGULATIONS GOVERNING COAL-LAND LEASES IN THE TERRITORY OF ALASKA.

LEASING OFFER.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 18, 1916.

In pursuance of the authority vested in the Secretary of the Interior by the act of Congress approved October 20, 1914 (38 Stat., 741), "to provide for the leasing of coal lands in the Territory of Alaska," the coal lands in the Matanuska and Bering River fields are now and hereby offered for leasing under the terms of said act and the regulations adopted and approved in accordance therewith.

Intending lessees will find herewith:

1. Copy of the law and regulations, with approved form of proposed lease.
2. Information relating to the operation and development of the Alaska coal fields, prepared in the several bureaus of the department.

FRANKLIN K. LANE,
Secretary.

PART 1. LAW AND REGULATIONS.

COAL-LAND LEASING ACT.

The text of the act (38 Stat., 741), approved October 20, 1914, that provides for the leasing of coal lands in the Territory of Alaska is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and directed to survey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields, and thereafter to such areas or coal fields as lie tributary to established settlements or existing or proposed rail or water transportation lines: *Provided,* That such surveys shall be executed in accordance with existing laws and rules and regulations governing the survey of public lands. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000 for the purpose of making the surveys herein provided for, to continue available until expended: *Provided,* That any surveys heretofore made under the authority or by the approval of the Department of the Interior may be adopted and used for the purposes of this Act.

"SEC. 2. That the President of the United States shall designate and reserve from use, location, sale, lease, or disposition not exceeding five thousand one hundred and twenty acres of coal-bearing land in the Bering River field and not exceeding seven thousand six hundred and eighty acres of coal-bearing land in the Matanuska field, and not to exceed one-half of the other coal lands in Alaska: *Provided*, That the coal deposits in such reserved areas may be mined under the direction of the President when, in his opinion, the mining of such coal in such reserved areas, under the direction of the President, becomes necessary, by reason of an insufficient supply of coal at a reasonable price for the requirements of Government works, construction and operation of Government railroads, for the Navy, for national protection, or for relief from monopoly or oppressive conditions.

"SEC. 3. That the unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of forty acres each, or multiples thereof, and in such form as in the opinion of the Secretary will permit the most economical mining of the coal in such blocks, but in no case exceeding two thousand five hundred and sixty acres in any one leasing block or tract; and thereafter, the Secretary shall offer such blocks or tracts and the coal, lignite, and associated minerals therein for leasing, and may award leases thereof through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, to any person above the age of twenty-one years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States or of any State or Territory thereof: *Provided*, That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States: *And provided further*, That no railroad or common carrier shall be permitted to take or acquire through lease or permit under this Act any coal or coal lands in excess of such area or quantity as may be required and used solely for its own use, and such limitation of use shall be expressed in all leases or permits issued to railroads or common carriers hereunder: *And provided further*, That any person, association, or corporation qualified to become a lessee under this Act and owning any pending claim under the public-land laws to any coal lands in Alaska may, within one year from the passage of this Act, enter into an arrangement with the Secretary of the Interior by which such claim shall be fully relinquished to the United States; and if in the judgment of the Secretary of the Interior, the circumstances connected with such claim justify so doing, the moneys paid by the claimant or claimants to the United States on account of such claim shall, by direction of the Secretary of the Interior, be returned and paid over to such person, association, or corporation as a consideration for such relinquishment.

"All claims of existing rights to any of such lands in which final proof has been submitted and which are now pending before the Commissioner of the General Land Office or the Secretary of the Interior for decision shall be adjudicated within one year from the passage of this Act.

"SEC. 4. That a person, association, or corporation holding a lease of coal lands under this act may, with the approval of the Secretary of the Interior and through the same procedure and upon the same terms and conditions as in the case of an original lease under this Act,

secure a further or new lease covering additional lands contiguous to those embraced in the original lease, but in no event shall the total area embraced in such original and new leases exceed in the aggregate two thousand five hundred and sixty acres.

"That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the original lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same competitive conditions as in case of an original lease.

"SEC. 5. That, subject to the approval of the Secretary of the Interior, lessees holding under leases small blocks or areas may consolidate their said leases or holdings so as to include in a single holding not to exceed two thousand five hundred and sixty acres of contiguous lands.

"SEC. 6. That each lease shall be for such leasing block or tract of land as may be offered or applied for, not exceeding in area two thousand five hundred and sixty acres of land, to be described by the subdivisions of the survey, and no person, association, or corporation, except as hereinafter provided, shall be permitted to take or hold any interest as a stockholder or otherwise in more than one such lease under this Act, and any interest held in violation of this proviso shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction, except that any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held for two years, and not longer, after its acquisition.

"SEC. 7. That any person who shall purchase, acquire, or hold any interest in two or more such leases, except as herein provided, or who shall knowingly purchase, acquire, or hold any stock in a corporation having an interest in two or more such leases, or who shall knowingly sell or transfer to one disqualified to purchase, or except as in this Act specifically provided, disqualified to acquire, any such interest, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$1,000: *Provided*, That any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held two years after its acquisition and not longer, and in case of minority or other disability such time as the court may decree.

"SEC. 8. That any director, trustee, officer, or agent of any corporation holding any interest in such a lease who shall, on behalf of such corporation, act in the purchase of any interest in another lease, or who shall knowingly act on behalf of such corporation in the sale or transfer of any such interest in any lease held by such corporation to any corporation or individual holding any interest in any such a lease, except as herein provided, shall be guilty of a felony and shall be subject to imprisonment for a term of not exceeding three years and a fine of not exceeding \$1,000.

"SEC. 8a. If any of the lands or deposits leased under the provisions of this Act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, entered into by the lessee, or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of two thousand five hundred and sixty acres in the Territory of Alaska, the lease thereof shall be forfeited by appropriate court proceedings.

"SEC. 9. That for the privilege of mining and extracting and disposing of the coal in the lands covered by his lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall not be less than two cents per ton, due and payable at the end of each month succeeding that of the shipment of the coal from the mine, and an annual rental, payable at the beginning of each year, on the lands covered by such lease, at the rate of twenty-five cents per acre for the first year thereafter, fifty cents per acre for the second, third, fourth, and fifth years, and \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases may be for periods of not more than fifty years each, subject to renewal, on such terms and conditions as may be authorized by law at the time of such renewal. All net profits from operation of Government mines, and all royalties and rentals under leases as herein provided, shall be deposited in the Treasury of the United States in a separate and distinct fund to be applied to the reimbursement of the Government of the United States on account of any expenditures made in the construction of railroads in Alaska, and the excess shall be deposited in the fund known as The Alaska Fund, established by the Act of Congress of January twenty-seventh, nineteen hundred and five, to be expended as provided in said last-mentioned Act.

"SEC. 10. That in order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this Act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period of not exceeding ten years, on such conditions not inconsistent with this Act as in his opinion will safeguard the public interest, without payment of royalty for the coal mined or for the land occupied: *Provided*, That the acquisition of holding of a lease under the preceding sections of this Act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such a license shall be no bar to the acquisition or holding of such a lease or interest therein.

"SEC. 11. That any lease, entry, location, occupation, or use permitted under this Act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal

lands by or under authority of the Government and for other purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein. If such reservation is made, it shall be so determined before the offering of such lease.

"That the said Secretary during the life of the lease is authorized to issue such permits for easements herein provided to be reserved, and to permit the use of such other public lands in the Territory of Alaska as may be necessary for the construction and maintenance of coal washeries or other works incident to the mining or treatment of coal, which lands may be occupied and used jointly or severally by lessees or permittees, as may be determined by said Secretary.

"SEC. 12. That no lease issued under authority of this Act shall be assigned or sublet except with the consent of the Secretary of the Interior. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property, and for the safety and welfare of the miners and for the prevention of undue waste, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions securing the workers complete freedom of purchase, requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to secure fair and just weighing or measurement of the coal mined by each miner, and such other provisions as are needed for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare.

"SEC. 13. That the possession of any lessee of the land or coal deposits leased under this act for all purposes involving adverse claims to the leased property shall be deemed the possession of the United States, and for such purposes the lessee shall occupy the same relation to the property leased as if operated directly by the United States.

"SEC. 14. That any such lease may be forfeited and canceled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease or of general regulations promulgated under this Act; and the lease may provide for the enforcement of other appropriate remedies for breach of specified conditions thereof.

"SEC. 15. That on and after the approval of this Act no lands in Alaska containing deposits of coal withdrawn from entry or sale shall be disposed of or acquired in any manner except as provided in this Act: *Provided*, That the passage of this Act shall not affect any proceeding now pending in the Department of the Interior, and any such proceeding may be carried to a final determination in said department notwithstanding the passage hereof: *Provided further*, That no lease shall be made, under the provisions hereof, of any land, a claim for which is pending in the Department of the Interior at the date of the passage of this Act, until and unless such claim is finally disposed of by the department adversely to the claimant.

"SEC. 16. That all statements, representations, or reports required, unless otherwise specified, by the Secretary of the Interior under this Act shall be upon oath and in such form and upon such blanks as the Secretary of the Interior may require, and any person making false oath, representation, or report shall be subject to punishment as for perjury.

"SEC. 17. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act.

"SEC. 18. That all Acts and parts of Acts in conflict herewith are hereby repealed."

COAL LANDS RESERVED.

The President of the United States is required by section 2 of the leasing act to "designate and reserve from use, location, sale, lease, or disposition, not exceeding 5,120 acres of coal-bearing land in the Bering River field, and not exceeding 7,680 acres of coal-bearing land in the Matanuska field," before opening the fields under the provisions of the act. The unreserved coal lands are thereafter to be "divided by the Secretary of the Interior into leasing blocks or tracts of 40 acres each or multiples thereof, and in such form as, in the opinion of the Secretary, will permit the most economical mining of the coal in such blocks, but in no case exceeding 2,560 acres in any one leasing block or tract." The lands having been thus divided into leasing blocks, the Secretary under the act is authorized, then and not before, to offer such blocks or tracts for leasing and award leases thereof through such plan as he may adopt, either by advertisement, competitive bidding, or otherwise.

It is recognized that if the Government were to reserve the total acreage allowed by law and were to select those areas that are believed to be best suited for profitable mining, the result might be to prevent effectually coal mining in Alaska until such time as the Government itself might undertake mine development and operation. The intention of Congress in passing the Alaska coal-leasing law is believed to have been the promotion of the mining of coal in the Territory as early as possible to meet the demands of the Government railroad, the Navy, and Alaskan consumers. The legal provision for Government reservation furnishes a means for safeguarding the public interest in the future, when lack of competition or other exigency may necessitate Government operation. The tracts now selected for reservation in accord with this policy are therefore such as are believed to possess the average rather than the highest value.

The President has therefore designated and reserved from use, location, sale, lease, or disposition the lands described as follows:

Lands reserved in Matanuska field, Seward base and meridian.

- (1) T. 19 N., R. 6 E.: N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ sec. 4;
NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ sec. 5.
T. 20 N., R. 6 E.: Lot 6 and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ sec. 31;
Lots 4, 5, 6, and 7 and SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ sec. 32;
Lots 3, 4, 5, and 6, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ sec. 33, containing
1,446.17 acres.

- (2) T. 20 N., R. 5 E.: NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$ sec. 20;
 NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ and S. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 21;
 SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$ sec. 22;
 NW. $\frac{1}{4}$ sec. 27;
 NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ sec. 28;
 E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 29, containing 1,880 acres.

Lands reserved in Bering River field, Copper River base and meridian.

- (3) T. 16 S., R. 8 E.: Secs. 23 and 24, containing 1,280 acres.
 (4) T. 16 S., R. 8 E.: NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, sec. 33.
 T. 17 S., R. 8 E.: N. $\frac{1}{2}$ NW. $\frac{1}{4}$ sec. 3;
 All of sec. 4;
 E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ sec. 5;
 E. $\frac{1}{2}$ NE. $\frac{1}{4}$ sec. 8;
 N. $\frac{1}{2}$ NW. $\frac{1}{4}$ sec. 9, containing 1,520 acres.
 (5) T. 17 S., R. 7 E.: Lot 3 and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 8;
 Lots 1 and 2, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$ sec. 9;
 NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 16;
 SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$ sec. 17;
 NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and lots 3 and 4 sec. 18,
 containing 1,556.98 acres.

All of the coal land in the remainder of these fields is open to application for lease, and none of this open territory will be withdrawn or reserved while there is any bona fide application for a lease thereon.

UNRESERVED LANDS.

As noted in the foregoing statement the *unreserved* lands in the coal fields must be divided by the Secretary into leasing "blocks" or "tracts," before he can make a leasing offer. A survey of said lands in accordance with the system of public-land surveys is therefore necessary, as the act requires each leasing block or tract to be described by subdivisions of the survey. To this end such a survey of the Bering River and Matanuska fields has been made and the known coal lands in those fields divided into leasing blocks, as shown on the maps of those fields (in pocket).

GENERAL REGULATIONS.

(1) By authority of the act of Congress approved October 20, 1914 (38 Stat., 741), the unreserved surveyed coal lands in the Bering River and the Matanuska coal fields, Alaska, have been divided into leasing blocks, or tracts, of 40 acres, or multiples thereof, and leases of such blocks or tracts, with the privilege of mining and disposing of the coal, lignite, and associated minerals therein may be procured from the United States in the following manner:

(2) On request addressed to the Commissioner of the General Land Office at Washington, D. C., a blank application and lease will be furnished the applicant; also, those who desire may procure from the Superintendent of Documents, Government Printing Office, Washington, D. C., a folio containing photolithographic copies of the approved plats of the topographic and subdivisional township surveys of the Matanuska field (13 townships) for \$1, and of the Bering River field (8 townships) for 75 cents.

(3) From and after June 1, 1916, for a period of 30 days, applications for coal-mining leases will be received at the General Land Office from duly qualified applicants.¹

¹ See modification, p. 150.

Under this act the qualifications of such lessees are defined as follows:

(a) Any person above the age of 21 who is a citizen of the United States;

(b) Any association of such persons (that is, citizens of the United States over 21 years of age);

(c) Any corporation or municipality organized under the laws of the United States, or of any State or Territory thereof, "*Provided*, That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States."

(4) The total area that may be embraced in one lease is fixed at 2,560 acres, which may include one or more contiguous leasing blocks, or tracts, as shown on the map; and no person, association, or corporation is permitted to take or hold any interest as a stockholder or otherwise in more than one lease under this act.

(5) The application blank calls for information as to the name of the applicant, a description of the leasing block or blocks desired, amount of capital proposed as an investment under the lease, time when actual development under the lease will begin, experience in coal mining, and reference as to financial standing.

(6) The statute under which these proceedings are authorized provides that the Secretary of the Interior may award leases "through advertisement, competitive bidding, or such other methods as he may by general regulation adopt," and the purpose of the applications required herein is to procure such information as will best enable the Secretary to award leases so as to procure the best terms on behalf of the United States, and the most effective development of the coal deposits of the Territory.

(7) When the time fixed for filing such applications shall have expired, all applications then on file will be promptly listed and the proposed terms thereunder will be noted. Thereafter due publication, at the expense of the Government, for a period of 30 days will follow in at least three of the leading trade journals, one each at New York, Pittsburgh, and Chicago, and for the same period of time in three newspapers of general circulation, one each at San Francisco, Seattle, and Juneau, of the applications filed, each to be designated by a number and not by the name of the applicant, the blocks or block applied for, with the announcement that at the expiration of the period of publication the said applications will be taken up and the proposals therein considered, subject to any better terms that may be offered by any other qualified applicant during the period of publication, or by the first applicant.

(8) All applications for a lease, or proposals in connection therewith, pending at the expiration of the period of publication will be submitted to the Secretary of the Interior in one report, with specific recommendations as to the awards that should be made or denied under the several applications or proposals; and thereafter such action will be taken by the Secretary on the report as may in his discretion seem warranted on the showing made in each case, by which he will obtain the largest investment proportionate to the acreage of the lease, and the earliest actual development of the coal mine on a commercial basis, reserving the right to modify proposed leasing blocks, or tracts, if the economical mining of the coal will

better be procured thereby, or finally to reject any or all applications if, in his judgment, the interests of the United States so require.

(9) An actual beneficial expenditure on the ground for mining development and improvement purposes of \$100 for each acre included within the lease for which application is made will be adopted as the minimum basis upon which the proposed investments of the several applicants will be considered and adjudged, with the requirement that not less than one-fifth of the proposed investment shall be expended in the development of the mine during the first year, and a like sum each succeeding year, for the period of four years following the execution of the lease; excess investments in any year over such proportionate amount to be credited on the expenditure called for in the year ensuing. A bond, to be executed within 10 days after the signature of the lease, in the sum of one-half the amount to be expended each year will be required of each lessee conditioned upon the expenditure of such sum within said period.

(10) The procedure prescribed in the foregoing is to procure the orderly consideration of all applications or proposals that may be submitted in accordance with the foregoing regulations and within the period of time therein fixed; but when final action shall have been taken by the department upon the applications or proposals thus submitted any qualified applicant may thereafter apply for a leasing block or tract, and his application will be received and disposed of in the same manner and after like publication as herein provided.

(11) Lands found to contain coal but not divided into leasing blocks may be hereafter divided into such blocks, and the lands therein made the subject of a leasing offer, the rights of adjacent lessees to be given due consideration in any award that may be made under such offer.

PROSPECTING.

The coal-leasing act makes no provision for the right of an intending lessee to enter upon and explore coal fields embraced within a lease offer prior to submission of his application for a lease.

Such a right, if existent, would by implication carry with it some protection from the interference of others while engaged in such inspection as well as the exclusive benefit of any discoveries made thereby and amount in effect to a preference right based upon discovery; otherwise the right of exploration would be an empty privilege.

The entire scheme of section 3 of the act which governs the manner in which leases shall be awarded goes upon the theory that the Government is to offer "known" coal lands for leasing without priority of right recognized in either discovery, "opening a mine," or application, and "awarding leases thereof through advertisement, competitive bidding, or such other methods as he (the Secretary of the Interior) may by general regulations adopt."

All prospective applicants, however, will be accorded every opportunity to enter upon, inspect, and explore these coal fields at their pleasure in so far as such action may be necessary to acquire a thorough knowledge of field conditions, but no possessory or other right, either as against other prospectors or applicants or the United States, shall be acquired thereby.

USE OF TIMBER.

The use of timber by the lessee, in addition to that taken from the leasehold under the terms of the lease, may be secured by him from other lands not embraced in leasing units in accordance with the regulations that may be prescribed by the Secretary of the Interior under the act of May 14, 1898 (30 Stat., 414), and the acts amendatory thereof; or by arrangement with the Department of Agriculture, if from a national forest.

LEASES AND PERMITS AND APPLICATIONS THEREFOR.

COAL-MINING LEASE.

Date. THIS INDENTURE OF LEASE, entered into, in quintuplicate, this _____ day of _____, A. D., 19____, by and between the United States of America, acting in this behalf by _____

Parties. _____, Secretary of the Interior, party of the first part, hereinafter called the lessor, and _____ party of the second part, hereinafter called the lessee, under and pursuant to the act of Congress, approved October 20, 1914 (38 Stat., 741), entitled "An act to provide for the leasing of coal lands in the Territory of Alaska, and for other purposes," hereinafter called the "coal leasing act,"

WITNESSETH.

Purposes. That the lessor, in consideration of the rents and royalties to be paid and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee, for the period of fifty years from the date hereof, the exclusive right and privilege to mine and dispose of all the coal and associated minerals in, upon or under the following described tracts of land, situated in the Territory of Alaska, to wit: _____

Description of land. _____

Mining and surface rights. containing _____ acres, more or less, together with the right to construct coke ovens, briquetting plants, by-products plants, and all such other works as may be necessary and convenient for the mining and preparation of coal and associated minerals for market, the manufacture of coke or other products of coal, and to use so much of the surface and the sand, stone, timber and water thereon as may reasonably be required in the exercise of the rights and privileges herein granted, the use of such timber to be subject to such regulations as may be prescribed by the Secretary of the Interior under the act approved May 14, 1898 (30 Stat., 414), and the acts amendatory thereof.

ARTICLE I.

SECTION 1. The lessor expressly reserves unto itself the right to grant or use such easements in, over, through or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes; also the right to use, lease, or dispose of so much of the surface of the said lands as may not be actually needed, or occupied by the lessee in the conduct of mining operations. ^{Rights reserved by lessor.}

ARTICLE II.

It is expressly understood and agreed, that this lease is granted subject in all respects to the conditions, limitations, penalties and provisions contained in the "Coal Leasing Act," which act is hereby made a part hereof to the same extent as if incorporated herein. ^{Lease subject to "Coal Leasing Act."}

ARTICLE III.

It is further expressly understood and agreed that the mining rights and privileges leased as aforesaid shall extend to and include only coal and associated minerals, as hereinafter defined, and that no rights or privileges respecting any other kind or character of mineral, or mineral substance whatsoever, are granted or intended to be granted by this lease. ^{Mining rights limited to coal and associated minerals.}

ARTICLE IV.

The lessee in consideration of the lease of the rights and privileges aforesaid hereby covenants and agrees as follows:

SECTION 1. To invest in actual mining operations upon the leasing block included herein, the sum of ----- ^{Investment.}

----- dollars, of which sum not less than one-fifth shall be so expended during the first year succeeding the execution of this instrument, and a like sum each succeeding year for the period of four years; to furnish a bond, within 10 days after signature of the lease, in the sum of one-half the amount to be expended each year, conditioned upon the expenditure of such sum within said period, and submit annually, at the expiration of each year for the said period, an itemized statement, as to the amount and character of the expenditure during said year.

SEC. 2. To pay as an annual rental for each acre or part thereof covered by this lease; the sum of 25 cents per acre for the first year, payment of which amount is hereby acknowledged, the sum of 50 cents per acre per year for the second, third, fourth, and fifth years, and \$1 per acre for the sixth and each succeeding year during ^{Annual rental.}

the life of this lease, all such annual payments of rental to be made on the anniversary of the date hereof, and to be credited on the first royalties to become due hereunder during the year for which said rental was paid.

Royalty.

SEC. 3. To pay a royalty of 2 cents on every ton of 2,000 pounds of coal shipped or removed from the leased lands or manufactured into coke, briquets or other products of coal, or consumed on the premises, during the first five years succeeding the execution of this lease, and 5 cents per ton for the next 20 years. Royalties shall be payable at the end of each calendar month next succeeding that of the said shipment, removal, donation, manufacture or consumption.

Lessee to keep record of all coal shipped.

SEC. 4. To accurately weigh all coal shipped or removed from the leased premises, sold, or donated to local trade, manufactured into coke, briquets, or other products of coal, or otherwise consumed or utilized, and to accurately enter the weight or weights thereof in due form in books to be kept and preserved by the lessee for such purpose, together with the car numbers, if any, of the coal shipped by rail.

Reports to be furnished monthly by lessee.

SEC. 5. To furnish in manner and form and at such time during each calendar month as the lessor shall prescribe, but in no event later than the last day thereof, the following written reports covering the month immediately preceding, certified under oath by the superintendent at the mine, or by such other agent on the property having personal knowledge of the facts as may be designated by the lessee for such purpose, to wit:

A report copied from the books required to be kept at the mine under section 4 of this article showing the facts required to be entered therein; a report of the number of mine cars of mine-run coal hoisted or trammed from each coal bed of each separate mine; a report showing the quantity, size, and character of coal shipped, used for power purposes and lease consumption; donated to employees, manufactured into coke, briquets, or other products or by-products of coal; in storage on the premises, with the quantity of coal of various sizes added thereto and taken therefrom during the month.

ARTICLE V.

Periods for readjustment of royalty.

It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder at the end of 25 years from the date hereof, and at the end of 15 years thereafter, and thereafter at the end of each succeeding 10-year period during the continuance of this lease: *Provided*, That in any such readjustment the royalty fixed shall not exceed 5 per cent of the average selling price of coal of like character at the mine, per ton of 2,000 pounds in the coal field embracing the tracts covered by this lease, as shown by the books of the lessees operating in said field during a period of five years next preceding such readjustment.

ARTICLE VI.

This lease is made subject to the following provisions, which the lessee accepts and covenants faithfully to perform and observe:

SECTION 1. The lessee shall diligently proceed to prospect for, develop, and mine the coal in or upon the leased lands; shall carry on all mining operations in a good and workmanlike manner, having due regard to the health and safety of miners and other employees; and shall leave no available coal abandoned which could be recovered by the most approved methods of mining when in the regular course of mining operations the time shall arrive for mining such coal. No mine, entry, level, or group of rooms or workings shall be permanently abandoned and rendered inaccessible, save with the approval of the authorized representative of the lessor.

Mining operations to be energetically prosecuted.

Workings not to be abandoned until examination made.

SEC. 2. And also shall develop and mine the coal in the leased lands in accordance with a system to be shown by a preliminary plan on a scale of not more than 200 feet to the inch and a written description thereof, which plan and description shall be submitted for approval by the authorized representative of the lessor.

Preliminary plan of mining to be submitted in advance of operations on a commercial scale.

SEC. 3. And also where more than one bed of coal is known to exist in the leased lands, shall not draw or remove the pillars in any lower bed, before the available coal in any or all upper beds has been mined, unless it shall be decided by the authorized representative of the lessor that the workings in any or all of the upper beds will not be seriously injured by the extraction of the pillar coal in the lower workings. Where mining operations are being carried on in a bed that lies either below or above another bed in which mining has been or is being carried on and in which the pillars have not been pulled, and where the vertical distance between the two beds is less than fifteen times the thickness of the lower of the two beds, the lessee shall, as far as practicable, so arrange the pillars that those in the lower bed shall be vertically beneath those in the upper bed. Where practicable, by reason of either commercial or mining conditions, the available coal in the upper beds shall be exhausted before the coal in the lower beds is mined.

Where two or more beds of coal pillars in lower beds to be left until coal in upper beds extracted. Exceptions.

Pillars in lower beds to be arranged vertically under pillars in upper beds.

SEC. 4. And also shall not, without the consent in writing of the authorized representative of the lessor first had and obtained, mine any coal, or drive any underground working, or drill any lateral bore hole within 50 feet of any of the outside boundary lines of the leased lands, nor within such greater distance of such boundary lines, as the said representative shall prescribe for the protection of the property or the safeguarding of mining operations hereunder; but in the event the coal up to the like barrier in adjoining premises shall have been worked out and exhausted, and the water therein shall have been lowered below the working level of the opera-

Fifty-foot barrier pillars.

Lessee may be required to mine barrier pillars on adjacent lands.

tions on the same bed on the lands covered by the lease, the lessee hereunder hereby agrees, upon the written demand of said representative, to mine out and remove all the available coal in such barriers, both in the lands covered by this lease and on the adjoining premises, whenever same can be mined without hardship to the lessee and where the coal-mining rights in such adjoining premises are owned by the lessor.

Limitations of coal to be recovered in advance workings under "room-and-pillar" system.

SEC. 5. And also where the "room-and-pillar," or any other system of mining is followed which requires advance workings in the solid coal, including entries, breakthroughs, and rooms, instead of a system of mining under which all the coal is mined out and extracted as the work advances, shall not, without the consent in writing of the lessor being first had and obtained, mine and remove from such advance workings more than the following maximum percentages of the coal area for the specified depths of cover, viz:

Not more than 70 per cent where the cover is 100 feet or over but less than 200 feet in depth; not more than 65 per cent where the cover is 200 feet or over but less than 300 feet in depth; not more than 60 per cent where the cover is 300 feet or over but less than 400 feet in depth; not more than 55 per cent where the cover is 400 feet or over but less than 500 feet in depth; not more than 50 per cent where the cover is 500 feet or over but less than 750 feet in depth; not more than 45 per cent where the cover is 750 feet or over but less than 1,000 feet in depth; not more than 40 per cent where the cover is 1,000 feet or over but less than 1,250 feet in depth; not more than 35 per cent where the cover is 1,250 feet or over but less than 1,500 feet in depth; not more than 30 per cent where the cover is 1,500 feet or over but less than 1,750 feet in depth; not more than 25 per cent where the cover is 1,750 feet or over but less than 2,000 feet in depth; not more than 20 per cent where the cover is 2,000 feet or over.

Definition of term "percentage of area."

The said coal areas shall mean an area parallel with the dip or raise of the coal bed. The percentages of coal areas specified shall mean the percentages of coal to be mined in the areas comprised in the advance workings as compared with the percentages of coal to be left standing in such workings, and shall not be construed to mean the percentage of the total amount of coal in any such area of any such bed, where such bed in such area is thicker than the height of any such workings, nor shall such percentages of areas be held to include the coal extracted from the pillars in any such area, panel, or district of the mine, as it is the intent of the parties hereto that save as otherwise provided in this lease, and except where the retention of pillars shall be necessary for the maintenance of main roads or passageways or for the protection of the property, all such pillars shall be mined and removed as rapidly as proper mining will permit.

Pillars to be removed as rapidly as possible.

Exceptions.

SEC. 6. And also shall not, save as hereinafter authorized, light, keep, or maintain any fire in any mine or striping, except as approved by the authorized representative of the lessor, or underground in any mine, or in contact with the coal in place or in or along the outcrop of any coal bed. Failure to take prompt and vigorous steps for the extinguishment of any such fire shall be sufficient ground for the entry of the lessor and the cancellation of this lease.

Fires in mine prohibited.

SEC. 7. And also shall promptly notify the authorized representative of the lessor of the discovery of any valuable mineral or mineral substance other than coal in the course of mining operations hereunder, and shall not mine or remove same unless the same is an associated mineral as hereinafter defined: *Provided*, That such quantities of fire clay, shale, or gas from the coal measures as may be required by the lessee in the conduct of operations hereunder may be removed and used without such written permission and without payment of royalty therefor. The lessee shall keep careful and accurate record in manner and form as may be prescribed by the lessor of all such associated minerals mined, used, or carried away, and shall pay such rates of royalty thereon as may be fixed by the said lessor, except as above provided.

Discovery of valuable mineral substance other than coal to be reported.

Lessee to have free use of fire clay and natural gas for lease purposes.

Record of associated minerals mined to be kept.

SEC. 8. And also shall keep at the mine office clear, accurate, and detailed maps on a scale of 100 feet to the inch, in the form of a horizontal projection on tracing cloth, of the workings in each coal bed in each separate mine on the leased lands, a separate map to be made for each such bed, and for the surface immediately over the underground workings, and to be so arranged with reference to a public land corner that the maps can be readily superimposed.

Mine map required to be kept at the mine office.

Each map of the workings in any coal bed shall show the location of all openings connecting such bed with the workings in any other bed, or with any adjacent mine, or with the surface; the location of all entries, gangways, rooms, or breasts, and any other narrow or wide workings, including the outlines of abandoned workings, and record of whether accessible or inaccessible; also barrier pillars, refuge chambers, stoppings, ventilating doors, overcasts, undercasts, regulators, and direction of air currents at the time of making map; location of stationary haulage and hoisting engines; permanent electrical generators, dynamos, and transformers; indications of trolley roads throughout their extent; also fire walls, sumps, and large bodies of standing water; position of main pumps and fire pipe lines; there shall also be marked on such maps the elevations above or below sea level or approved datum at points not over 200 feet apart horizontally, or over 100 feet apart vertically, in all main slopes, entries, levels, or headings, together with the thickness of coal beds at such intervals, and the elevations at the tops and bottoms of all shafts, slopes, and inclines.

Things required to be shown on detailed map of workings.

Requirements
for map of surface
over working.

The map of the surface immediately over the mine workings shall show all prominent topographic features and culture, section and township lines, the elevations above sea level or an approved datum, and contours at vertical intervals of 25 feet of such topographic features. Such map, together with the maps of the underground workings, shall be brought up to date not less than once in every six months.

Things re-
quired to be
shown on general
property map to
be kept at mine
office.

The lessee shall also make and keep at the mine office, at such time after the commencement of mining operations as the authorized representative of the lessor may direct, a clear and accurate general map of the entire leased lands, on a scale of 400 feet to the inch. Such map shall show all prominent topographical features and culture; the location of the surface areas immediately over the mine workings shown on the detailed surface map hereinbefore required; township, section, and property lines; the location of high-water marks; the outline of coal outcrops where known; the outlines of the chief mine workings, indicating the workings in each separate coal bed by distinguishing marks and the elevations above sea level or an approved datum, and contours at vertical intervals of 25 feet of the chief topographic features. Such map shall be brought up to date not less than once in every six months.

Prints of maps
to be furnished
lessor.

Blue prints or reproductions in duplicate of the maps required as aforesaid shall be furnished the authorized representative of the lessor when made, and supplemental prints or reproductions in duplicate furnished on or before January 1 of each succeeding year, showing the extensions, additions, and changes since the last map or supplement was submitted. All mine progress maps kept by the lessee shall at all times be subject to examination by said representative.

Abandoned
areas to be sur-
veyed and
mapped.

The lessee whenever any mine, or any workings therein are to be abandoned or indefinitely closed, and before same shall be abandoned or closed, or allowed to become inaccessible, shall make a survey thereof so as to accurately show the entire worked-out area or areas, and shall extend the results of such survey on the map or maps of the underground workings hereinbefore required, and promptly forward blue prints or reproductions thereof in duplicate to the said representative.

Maps may be
made at lessee's
expense in case
of failure to fur-
nish.

If the lessee shall fail to make or furnish any map or extension or revision as herein required within 90 days after demand therefor shall have been made by the authorized representative of the lessor, such representative may employ a competent engineer to make a survey of the mine, and plat the same as above provided, the expense thereof to be paid by the lessee, and in the event that the lessee shall fail to make such payment within 60 days after demand therefor by the authorized representative of the lessor, such failure shall constitute a cause of forfeiture of this lease.

SEC. 9. And also shall, where more than ten men are employed underground on any one shift in any separate mine, provide an escapeway or second exit to the surface, which shall be separated at the surface from the first exit by not less than 50 feet of strata in case of drift, slope, or tunnel workings, or in case of vertical shafts, or of inclined shafts having a pitch of more than 45°, by not less than 200 feet of strata. An escapeway or outlet through an adjoining mine shall be regarded as a satisfactory compliance with this requirement if kept at all time in proper condition for use. If such adjoining mine shall be abandoned at any time, or shall cease to operate indefinitely, the lessee hereunder shall be solely responsible for the cost and expense of maintaining such outlet, and in the event such outlet shall be abandoned or permitted to become unsafe for use, the number of men employed on any one shift shall be reduced below ten until such time as a second exit or escapeway shall be provided.

Second exit to surface to be provided, where more than 10 men employed on a shift.

Outlet through adjacent mine sufficient compliance.

SEC. 10. And also shall not employ more than five men underground on any one shift in any new working of any mine unless such new working shall be so connected with adjacent workings as to provide two distinct and separate means of escape from such new working: *Provided*, That with the approval of the authorized representative of the lessor, not exceeding ten men may be so employed in advance of the making of such second opening, but in no case shall any rooms, drifts, or slopes be opened or worked until such second opening is constructed.

Not more than five men to be employed in new workings unless second opening provided.

Exceptions.

SEC. 11. And also shall not construct or maintain any structure of inflammable material within 75 feet of any mine opening; nor within said distance permit any structure of noninflammable material to be connected to any other structure by means of any structure or erection of inflammable material, or to be connected to any structure beyond said distance which shall be constructed of inflammable material, except as follows, that is to say:

No building of inflammable material to be constructed within 75 feet of any mine.

(a) An open timber framework or headframe of timber may be constructed over a shaft, slope, or incline.

Exceptions.

(b) The posts, studs, and rafters of any such structure may be of wood if the covering or lining is made of non-inflammable material, but under no circumstances shall wood flooring be used, except in tippie and trestle structures.

SEC. 12. And also, except in a prospect opening, shall separate the main intake and return airways and all workings parallel to such airways by not less than 50 feet of strata except for break-throughs or crosscuts for ventilation or haulage, and shall provide for such greater distance between such airways or between any such airway and parallel workings as may be required in the judgment of the authorized representative of the

Main intake and return airways to be separated by not less than 50 feet of natural strata.

Pillars to be left standing until prior to final abandonment of mine.

lessor. The lessee agrees that the pillars thus provided for shall be left standing until in the proper course of mining operations the time shall arrive for their removal immediately prior to the final abandonment of the workings in that particular coal bed.

Ventilating fan to be provided where more than 10 men employed on shift.

SEC. 13. And also shall whenever more than ten men are employed underground on any one shift provide a fan or other mechanical means for circulating such amount of ventilating current as may be required by any law of the United States or of the Territory of Alaska now or hereafter enacted, or by the rules and regulations prescribed by the lessor, such fan or other mechanical means and the connection between same and the point of the entrance of the air current into the mine to be

Fan not to be placed in direct line with any mine entrance.

made of noncombustible material; and the lessee shall not set same in line with the axis of any mine opening, but shall place same at a distance of not less than 15 feet from the projection of the nearest side of such opening, and shall provide explosion doors of the full area of the air shaft or airway, in direct line with any and all such mine openings in order to protect said fan or other mechanical means of air circulation in case of a mine explosion: *Provided*, That during such time as the mine is being opened up and less than ten men are employed underground on any one shift, and with the written approval of the authorized representative of the lessor, a furnace may be used for ventilation in a nongaseous mine if the fire box thereof is inclosed by brick, rock, or concrete walls, and a passageway around such inclosure at least two feet in width provided: *And provided further*, That if a wooden stack is used in connection with such furnace the lessee shall not permit such stack to be in contact with any coal bed or with any inflammable shale.

With written approval of lessor's representative furnace may be used for ventilation under specified conditions.

Slack and refuse to be disposed of so as not to become a public or private nuisance.

SEC. 14. And also shall make such provisions for the disposal of the waste, slack, and refuse of the mine that the same shall not be a nuisance, inconvenience, or obstruction to any right of way, stream, or other means of transportation or travel, or to any private or public lands, or embarrass the operation of any other mine on the leased lands, or on adjoining lands, or in any manner occasion private or public damage, nuisance, or inconvenience. All waste containing practically no coal shall be deposited separate and apart from waste containing coal and in accordance with the directions of the authorized representative of the lessor.

Abandoned workings to be covered or fenced.

SEC. 15. And also shall upon abandonment substantially fence, fill in, cover, or close all surface openings or workings where persons or animals are likely to be injured by falling therein, or endangered by accumulations of gas, except as the lessor shall otherwise direct; and shall maintain all such fencing or covering in a secure condition during the term hereof.

SEC. 16. And also expressly agrees that all mining and related operations shall be subject to the inspection of authorized representatives of the lessor, and that such representatives, with all proper and necessary assistants, may at all reasonable times enter into and upon the leased lands and survey and examine same and all surface and underground improvements, works, machinery, equipment, and operations, and further expressly agrees to furnish said representatives and assistants all necessary assistance, conveniences, and facilities in making any such survey and examination.

Operations subject to inspection of lessor's representatives.

Lessee to furnish all necessary assistance.

SEC. 17. And also shall permit any authorized representative of the lessor to examine all books and records pertaining to operations under this lease, and to make copies of and extracts from any or all of same, if desired. The information so derived to be held confidential.

Lessee to permit examination of books for purpose of checking royalty returns.

SEC. 18. And also shall permit the lessor, its lessees, or transferees to make and use upon or under the leased lands any workings necessary for freeing any other mine from water, causing as little damage or interference as possible to or with the mine or mining operations of the lessee hereunder. Any such use by a lessee or transferee shall be conditioned upon the payment to the lessee hereunder of the amount of actual damages sustained thereby and adequate compensation for such use.

Lands leased and easements therein may be used for purposes of rendering operations on adjoining lands more safe; such use to be compensated for.

SEC. 19. And also shall accurately weigh or measure in the car and truly account for the coal mined and loaded by each miner, where the miners are paid either by the weight of their output or upon the basis of the measurement of the coal in the car; keep a correct record of all coal so weighed or measured; post or display such record daily for the inspection of the miners and other interested persons; and require the weighman or person appointed to measure the coal in the car where the miners are paid upon the basis thereof, before entering upon his duties, to make and subscribe to an oath before some person duly authorized to administer oaths that he will accurately weigh or measure and keep true record of the coal so weighed or measured and credit same to the miner entitled thereto, such affidavit to be kept conspicuously posted at the place of weighing, if any, but nothing contained herein shall be construed to prevent the lessee, in case rock and bone is loaded by the miner, from estimating or separately weighing, and deducting the amount thereof from the weights of coal accredited to such miner. The lessee hereby agrees that if a majority of the miners employed on the leased lands so desire they shall be permitted to employ at their own expense one of their fellow employees to see that the coal is properly weighed or measured and that a correct account of same is kept, and agrees to afford such person every facility to certify the weights and measurements while the weighing or measuring is being done: *Pro-*

Lessee to keep true and accurate weights or measurements of coal mined and loaded by miners.

Weighman to take oath for faithful discharge of duties

Miners to be permitted to employ check-weighman.

Checkweigh-
man to take oath
for faithful dis-
charge of his
duties.

vided, That the lessee shall not be required to so do unless such person, before entering upon his duties, shall make and subscribe to an oath before some person authorized to administer oaths that he will faithfully discharge the duties of his position, such oath to be kept conspicuously posted at the place of weighing, if any.

Wages to be
paid in lawful
money.

SEC. 20. And also shall pay all miners and other employees, both above and below ground, at least twice each month in lawful money of the United States, and shall permit such miners and other employees full and complete freedom of purchase, but with a view to increasing safety this provision shall not apply to the purchase of explosives, detonators or fuses, and shall not require or permit miners or other employees, except in case of emergency, to work underground for more than eight consecutive hours in any one calendar day, not including time for lunch or meals, or the time required to reach the usual working place.

Freedom of
purchase to be
allowed.

Eight-hour
work day re-
quired.

Premises to be
surrendered in
proper condition
for continuance of
mining opera-
tions.

SEC. 21. And also shall, at the expiration or earlier termination of this lease, deliver up to the lessor the lands covered by this lease, together with all fixtures, improvements, and appurtenances, save as hereinafter provided, in such a secure and proper state that mining operations may be continued immediately to the full extent and capacity of such mine.

ARTICLE VII.

It is further mutually understood and agreed as follows:

Suspension of
operations for
more than three
months without
consent to be
cause of forfeit-
ure.

SECTION 1. That the suspension of mining operations by the lessee for a longer period than three months without the consent in writing of the lessor or its authorized representatives shall be cause of forfeiture of this lease. If the lessee shall be unable to continue the operation of the mine for any cause, not due to the fault or negligence of the lessee, he shall be entitled to the suspension of operations for such a length of time, and upon payment of such minimum royalties, and such other conditions as may be specified in the order of suspension, but the issuance of any such order shall not excuse the payment of any rents or royalties due under this lease, or prevent forfeiture for failure to pay same, and the acceptance of any such rent or royalty shall not waive any other right of the lessor hereunder.

Upon applica-
tion consent for
suspension for a
specified period
may be obtained.

Lease not to be
assigned without
consent of lessor.

SEC. 2. That the lessee shall not assign this lease or any interest therein, nor sublet any portion of the leased premises, or any of the rights and privileges herein granted, without the written consent of the lessor being first had and obtained.

Breach of lease
covenants may be
waived in writ-
ing.

SEC. 3. That the lessor or its authorized representative may by notice in writing waive any breach of the covenants and conditions contained herein, except such as are required by the aforesaid "coal leasing act," but any such waiver shall extend only to the particular

breach so waived, and shall not limit the rights of the lessor with respect to any future breach. No waiver not in writing shall be in any way binding upon the lessor.

SEC. 4. That the lessee may terminate this lease at any time upon giving four months' notice in writing to the lessor or its authorized representative, and upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mine on the leased lands in accordance with the provisions of this lease: *Provided*, That in such case the right of valuation and purchase, accorded the lessor in the section next following (5), shall be exercised within said period of four months.

Lease may be terminated at any time upon payment of rents, etc.

Termination not to be effective until property examined.

SEC. 5. That at the expiration or earlier termination of this lease all tools, machinery, and equipment, including tracks, rails, and pipe placed by the lessee in the mine or on the property, shall before removal from normal position, if requested by the lessor or its authorized representatives, be valued by three disinterested and competent persons to be chosen in the manner hereinafter provided for the appointment of arbitrators, the valuation of these three or of a majority of them to be conclusive of the value of any or all of the said property; and the lessor or its agent, licensee, or lessee shall have the right to purchase within four months thereafter any or all such tools, machinery, equipment, or materials at the said valuation, deducting therefrom all rents, royalties, or other payments at that time due and payable by the lessee. If such valuation shall not be requested or the purchase shall not be made within said time the lessee shall have the privilege of removing same from the premises within one year from the expiration or termination of this lease, provided all debts and moneys specified in section 4 of this article shall have been paid. The lessee shall not, and hereby covenants not to, remove any mine supports, timbers, or props in place. All buildings and improvements erected upon the leased lands shall become a part of the property, and machinery and equipment shall not be removed therefrom in such a way as to cause any permanent injury to such buildings or improvements.

Lessor to have privilege of valuing and purchasing equipment, etc., on termination of lease.

Lessee may remove same within year.

SEC. 6. That if the lessee shall make default in the performance or observance of any of the terms, covenants, and stipulations of this lease, and such default shall continue for 60 days after service of written notice thereof by the lessor or its authorized representatives, then all the rights and privileges of the lessee cease and determine, and the lessor may, by appropriate proceedings, have this lease forfeited and canceled in a court of competent jurisdiction.

Forfeiture of lease.

A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for

any other cause of forfeiture or for the same cause occurring at any other time.

Questions which may be submitted to arbitration.

SEC. 7. That in case any dispute shall arise between the lessor and lessee as to any question of fact, or as to the reasonableness of any requirement made by the lessor under the provisions of this lease, in the matter of operation, methods, means, expenditures, use of easements, compensation for joint occupancy by another lessee of a portion of the leased premises, or such other questions as are not determined by express statutory provision, such questions or disputes shall be settled by arbitration in the manner provided for by this section, and the lessor and lessee hereby covenant and agree each with the other to promptly comply with and carry out the decision or award of each and every board of arbitration appointed under this section.

Manner of appointing arbitrators.

Questions in dispute to be determined by arbitration hereunder shall be referred to a board of arbitration consisting of three competent persons, one of which persons shall be selected by the lessor or its authorized representative, and one by the lessee, and the third by the two thus selected: *Provided*, That the lessor and lessee may agree upon one sole arbitrator or upon the third arbitrator. The party desiring such arbitration shall give written notice of the same to the other party, stating therein definitely the point or points in dispute, and name the person selected by such party hereto within 20 days after receiving such notice to name an arbitrator; and in the event it does not do so, the party serving such notice may select the second arbitrator and the two thus named shall select the third arbitrator. The arbitrators thus chosen shall give to each of the parties hereto written notice of the time and place of hearing, which hearing shall not be more than 30 days thereafter, and at the time and place appointed shall proceed with the hearing unless for some good cause, of which the arbitrators or a majority of them shall be the judge, it shall be postponed until some later day or date within a reasonable time. Both parties hereto shall have full opportunity to be heard on any question thus submitted, and the written determination of the board of arbitration thus constituted or of any two members thereof or, in case of the failure of any two members to agree, then the determination of the third arbitrator shall be final and conclusive upon the parties in reference to the questions thus submitted. All such determinations shall be in writing, and a copy thereof shall be delivered to each of such parties.

Decision of third arbitrator to be final.

New board to be chosen in event of failure of arbitrators first selected to choose a third.

It is further agreed that in the event of the failure of the lessor and lessee, or of the two arbitrators selected as aforesaid, by the parties hereto, within 20 days from notice to them of their selection, to agree upon the third

arbitrator, then the Secretary of the Interior shall appoint such arbitrator.

The said third arbitrator shall receive not to exceed \$15 per day as full compensation for his services and for all expenses connected therewith, exclusive of transportation charges; but such compensation shall not be in excess of \$150 for any arbitration. The losing party to such arbitration shall be liable for the payment of such compensation and transportation expenses of such third arbitrator.

SEC. 8. That any notice in writing as to any matter mentioned in this lease, addressed to the lessee and left upon the premises with the superintendent, manager, clerk, or other person in charge of the mine or of the office, or, in the absence of any such person, posted on the door of the office, shall have the same force and effect as if served upon the lessee, and 15 days shall be considered a reasonable notice, unless a longer notice be herein provided for or be so provided in such notice.

ARTICLE VIII.

It is further expressly agreed and declared that the terms and phrases hereinafter mentioned shall have the meanings hereinafter assigned unless the context shall otherwise require, that is to say:

(a) The phrase "available coal" as used in this lease shall mean merchantable coal from any coal bed which, when reached in the prosecution of the lessee's operations hereunder, can be mined at a reasonable profit by the use of machinery and methods which at that time are modern and efficient.

(b) The term "mine" as used herein shall mean and include all underground workings now or hereafter opened or worked for the purpose of mining and removing coal and associated minerals, together with all buildings, machinery, and equipment, above and below ground, used in connection with such mining operations.

(c) The term "pit" or "open pit" shall mean and include stripping operations or any open-air workings.

(d) The term "coal" as used herein shall mean and include anthracite, semianthracite, semibituminous, bituminous, subbituminous, lignite, and graphitic coal, lignite, natural coke, and such bony coal as is suitable for use as a fuel.

(e) The term "associated minerals" as used herein shall mean and include fire clay, shale, sandstone, and the bedded materials of the coal measures, exclusive of gold-bearing or other metalliferous deposits.

(f) The term "lessee" as used herein shall mean and include the heirs, executors, administrators, successors, or assigns of the lessee hereinbefore specified.

ARTICLE IX.

It is further mutually covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall insure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

ARTICLE X.

It is also further agreed that no member of or delegate to Congress or resident commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States and sections 114, 115, 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat., 1109) relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,
By [L. s.]
Secretary of the Interior.

Witnesses:

..... [L. s.]
.....
.....

APPLICATION FOR COAL-MINING LEASE.

The undersigned,
a resident of
a

(Native born or naturalized; if the latter, furnish certificate.)

citizen of the United States, over 21 years of age, hereby applies, under the provisions of the act of October 20, 1914 (38 Stat., 741), for a mining lease of the certain leasing blocks, or tracts, of coal lands, to wit: Block, embracing the following specified legal subdivisions

..... aggregating acres. If I secure said lease, I propose to invest not less than dollars in active, productive mining operations conducted upon said lease; the active development will begin not later than My experience in coal-mining operations is as follows:

I neither own nor hold any interest, either as a stockholder or other-

wise, in any lease under this act, or in any application for such a lease, save and except the application now made; and I hereby refer to -----

as to my financial standing.

If I am awarded a lease, I will supply a satisfactory bond as required in section 9 of the regulations.

My post-office address is -----

(Signed) -----

Subscribed and sworn to before me, a -----

-----, on this -----

day of -----

[SEAL.] -----

COAL-MINING PERMIT.

REGULATIONS GOVERNING THE ISSUANCE OF PERMITS FOR THE FREE USE OF COAL IN THE UNRESERVED PUBLIC LANDS IN ALASKA.

Section 10 of the act of October 20, 1914 (Public 216), provides:

That in order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period not exceeding ten years, on such conditions not inconsistent with this act as in his opinion will safeguard the public interest without payment of royalty for the coal mined or for the land occupied: *Provided*, That the acquisition of holding of a lease under the preceding sections of this act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such license shall be no bar to the acquisition or holding of such a lease or interest therein.

Owing to there being no settlements or local industries in or adjacent to the Bering or Matanuska coal fields, and the contemplated leasing offer of coal lands in said fields, these regulations and the permits provided for shall not at present apply to coal deposits in those fields.

Qualifications.—Under the terms of the act, expressed in section 3 thereof, only citizens of the United States above the age of 21 years, associations of such citizens, corporations, and municipalities organized under the laws of the United States or of any State or Territory thereof, provided the majority of the stock of such corporations shall at all times be owned and held by citizens of the United States, are eligible to receive a permit to prospect for and mine coal from the unreserved public lands in Alaska.

Who may mine coal for sale.—All permittees may mine coal for sale except railroads and common carriers, who by the terms of section 3 of the act are restricted to the acquirement of only such an amount of coal as may be required and used for their own consumption.

Duration of permits.—Permits will be granted for two years, beginning at date of filing, if filed in person or by attorney, or date of mailing, if sent by registered letter, subject to the approval of the Commissioner of the General Land Office, and upon application and

satisfactory showing as to the necessity therefor, may be extended by the commissioner for a longer period, subject to such conditions necessary for the protection of the public interest as may be imposed prior to or at the time of the extension: Misrepresentation, carelessness, waste, injury to property, the charge of unreasonable prices for coal, or material violation of such rules and regulations governing operation as shall have been prescribed in advance of the issuance of a permit, will be deemed sufficient cause for revocation.

Limitation of area.—The act limits the area to be covered in any one permit to 10 acres. It is not to be inferred from this, however, that the permits granted thereunder shall necessarily cover that area. The ground covered by a permit must be square in form and should be limited to an area reasonably sufficient to supply the quantity of coal needed.

Scope of permit.—Permits issued under section 10 of the act of October 20, 1914, grant only a license to prospect for, mine, and remove coal free of charge from the unreserved public coal lands in Alaska, and do not authorize the mining of any other form of mineral deposit, nor the cutting or removal of timber.

How to proceed to obtain a permit.—The application should be duly executed on Form 4—020, and the same should either be transmitted by registered mail to, or filed in person with, the register and receiver of the United States land office of the district in which the land is situated. Prior to the execution of the application the applicant must have gone upon the land, plainly marked the boundaries thereof by substantial monuments, and posted a notice setting forth his intention of mining coal therefrom. The application must contain the statement that these requirements have been complied with and the description of the land as given in the application must correspond with the description as marked on the ground. The permit, if granted, should be recorded with the local mining district recorder, if the land is situated within an organized mining district.

When coal may be mined before issuance of a permit.—In view of the fact that by reason of long distances and limited means of transportation many applicants may be unable to appear in person at the United States land office to file their applications, it has been deemed advisable to allow such applicants the privilege of mining coal as soon as their applications have been duly executed and sent by registered mail to the proper United States land office. Should an application be rejected, upon receipt of notice thereof all privileges under this paragraph terminate and the applicant must cease mining the coal.

Action by register.—The register will keep a proper record of all applications received and all actions taken thereon in a book provided for that purpose. If there appear no reason why the application should not be allowed, the register will issue a permit on the form provided for that purpose. Should any objection appear either as to the qualifications of the applicant or applicants, or in the substance or sufficiency of the application, the register may reject the application or suspend it for correction or supplemental showing under the usual rules of procedure, subject to appeal to the Commissioner of the General Land Office. Upon the issuance of a permit the register will promptly forward to the Commissioner of the General Land Office, by special letter, the original application and a copy of the

permit, and transmit copies thereof to the Chief of the Alaskan Field Division, and to the local representatives of the United States Bureau of Mines, for their information.

NOTE.—These regulations are intended merely as a temporary arrangement to meet immediate necessities, as authorized by section 10 of the act of October 20, 1914, and are not to be construed as applying to the leasing of public coal lands in Alaska provided in other sections of the act.

APPLICATION FOR COAL-MINING PERMIT.

-----, 191

The Commissioner of the General Land Office,
Washington, D. C.

SIR: The undersigned, -----

(Name of applicant.)

of -----, hereby appl for a permit to
(Post-office address.)
prospect for, mine, and remove coal from the following-described land:

(Describe the land by legal subdivision if surveyed, and by metes and bounds with reference to some permanent natural landmark if unsurveyed.)

containing approximately ----- acres, situated within the
land district, ----- miles of -----

(Direction.)

Alaska, and in support of this application make the following representation as to qualifications to receive a permit:

(Citizenship of applicant or applicants must here be shown. If the applicant is a municipality or corporation, it must be shown under what laws it is organized; and if the latter, it must also be shown whether a majority of its stock is owned and held by citizens of the United States.)

The applicant further represent that ----- ha not,
(He, they, or it.)
within two years last past, applied for or received a permit to mine coal under the provisions of section 10 of the act of October 20, 1914, in the coal field in which the land described in this application is situated,

(State exceptions here, if any.)

and that the coal herein applied for is to be mined for the purpose of supplying the following demands; for which approximately ----- tons are required annually:

(Here itemize the various uses to which the coal is to be applied,

stating the number of tons necessary for each use.)

It is further represented that the boundaries of the tract described in this application have been plainly marked by substantial monuments, and that a proper notice describing the land and showing the intention of the applicant to apply for a free permit to mine coal therefrom has been posted in a conspicuous place upon the land.

On consideration that a permit be granted, the applicant hereby agree :

1. To exercise reasonable diligence, precaution, and skill in the operation of the mine, with a view to the prevention of injury to workmen, waste of coal, damage to Government property, and to comply substantially with the instructions and the rules and regulations printed on the back of this application.

2. To charge only such prices for coal sold to others as represent a fair return for the labor expended and reasonable earning value to which the investment in the enterprise is entitled, without including any charge for the coal itself.

3. Not to mine or dispose of, either directly or indirectly, any coal from the area covered by said permit for export or any purpose other than "strictly local and domestic needs for fuel."

4. To leave the premises in good condition upon the termination of the permit, with all mine props and timbers in the mine intact, and with the underground workings free from refuse and in condition for continued mining operations.

Signature of applicant

The foregoing application was signed by

of, the applicant therein, in the presence of the undersigned, who, at request and in
(His or their.) (His or their.)
presence and in the presence of each other, have subscribed our names as witnesses to the execution thereof.

Dated this day of, 19 .., at
Territory of Alaska.

Name	Residence
Name	Residence

THE NENANA FIELD.

A complete topographic and subdivisional township survey has been made of the Nenana field, and a folio containing photolithographic copies of the approved township plats of such surveys may be procured on application to the Superintendent of Documents, Washington, D. C., for \$1.

In view of the fact that it was impossible for any kind of practicable transportation facilities to reach this field during the season of 1915, the field has not been examined by the expert mining engineers and geologists of the Interior Department with the view to dividing it into leasing blocks. This work will be done during the summer of 1916, whereupon, as promptly as possible, opportunity will be given for leasing in the Nenana field in accordance with the regulations herein provided. In the meantime temporary free coal-mining permits will be allowed under section 10 of the leasing act, operations under such permits to be subject, however, to future leases, as it is not deemed advisable to allow operations under such permits to interfere with the larger and more permanent operations contemplated under lease.

The Government railroad from Seward to Fairbanks will pass through the Nenana coal field. From the fields to Fairbanks is 110 miles.

PART 2. INFORMATION RELATING TO OPERATION AND DEVELOPMENT.

COMMENTS ON PROVISIONS OF THE LEASE.

An explanation of those articles and provisions of the lease form whose purposes may not be self-evident follows. It should be understood that this explanation is not in any sense either a part of the lease or agreement or a construction of its terms.

It will be observed that the Alaskan coal leasing act (38 Stat., 741) specifically states that—

The unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of 40 acres each, or multiples thereof, and in such form as, in the opinion of the Secretary, will permit the most economical mining of the coal in such blocks, but in no case exceeding 2,560 acres in any one leasing block or tract.

In laying out the leasing blocks, or units, as described elsewhere in this report, it has been the endeavor to arrange each block so that the coal may be reached by drifts, tunnels, slopes, and shafts from adjacent valleys, or benches, and may be mined to the boundary of the lease by workings of reasonable length for underground haulage. In some cases, where the coal measures within a unit lie under high mountain ridges, it may be necessary to develop blocks by means of tunnels through adjacent leasing blocks.

In the case of some leasing blocks, particularly those in the Matanuska field, little is known about the coal measures that do not outcrop within the boundaries of the blocks, and prospecting will have to be done in some cases by drilling or by shafts. Manifestly many such leasing blocks will not be applied for immediately, but the presence of coal of workable thickness may be indicated subsequently by the developments on more accessible adjacent blocks.

ARTICLE 1, SECTION 1.

RIGHTS RESERVED BY LESSOR.

The lease plainly states that the lessor (represented by the Secretary of the Interior)—

Reserves unto itself the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under the authority of the Government and for other purposes * * *.

The purpose of this provision is to permit railroads, tramways, water lines, or other necessary means of transport and communication to be constructed and operated through blocks of land not reached by these means of transportation at the time these blocks were leased, and to enable leasing blocks or units not readily accessible on the surface to be reached by tunnels, slopes, or other openings driven through the blocks already leased. Whenever it is necessary to grant

or use an easement under this provision, the easement will be so arranged and located as to interfere in a minimum degree with mining operations on the blocks subject thereto. Wherever it seems advisable, jointly operated tunnels, slopes, or shafts for transportation and ventilation may be permitted, provided the conditions, limitations, penalties, and provisions contained in the act are observed. Whenever joint openings do not seem advisable, the openings for the operation of the subsequent leases will be required to be so driven as to interfere as little as may be with the operations of the prior lease or leases. Should there be material interference, the amount of damages to be paid to the prior lessee will be determined by a board of arbitrators, elsewhere referred to. (See art. 7, sec. 7.)

ARTICLE 3, SECTION 1.

MINING RIGHTS LIMITED TO COAL AND ASSOCIATED MINERALS.

Article 3 provides that—

The mining rights and privileges leased as aforesaid shall extend to and include only coal and associated minerals.

Article 8 (e) defines associated minerals as—

(Fire clay, shale, sandstone, and the bedded materials of the coal measures, exclusive of gold-bearing or other metalliferous deposits.

Article 6, section 7, provides that the lessee—

Shall promptly notify the authorized representative of the lessor of the discovery of any valuable mineral or mineral substance other than coal * * * and shall not mine or remove same unless the same is an associated mineral.

The same section provides that—

Such quantities of fire clay, shale, or gas from the coal measures as may be required by the lessor in the conduct of operations hereunder may be removed and used without such written permission and without payment of royalty therefor.

Thus, if the lessee discovers any mineral other than the associated minerals named above he should promptly notify the authorized representative of the Secretary of the Interior; but he may take such fire clay, shale, or gas from the coal measures as he needs in his operations without paying royalty thereon. For example, fire clay may be taken out for use at boiler plants or shale for the making of brick used on the lease or inflammable gas (methane) liberated by mining operations may be trapped underground and piped to the surface for use in providing heat or light on the premises.

ARTICLE 4, SECTION 1.

INVESTMENT.

The underlying purpose of this section is to prevent the tying up of a valuable block for speculative purposes. The requirement should not be an obstacle to an operating company that intends to proceed vigorously and systematically in the development of a lease, for all the expenditures made in actual mining developments on the property that do not represent promotion expenses or interest charges will be considered as investments. The expenditures for actual mining developments include all legitimate charges for prospecting,

the driving of tunnels, drifts, entries, or slopes, or the sinking of shafts, and also the construction of tipples, houses for the use of employees, trestles, tramways, storehouses, barns, stables, reservoirs, railroad tracks, and all other work which may actually be essential in the opening and operation of a mine. Under these requirements it is expected, if the coal deposits prove to be workable, that at the end of the five-year period the mine or mines on the lease will, or should be, developed to a tonnage capacity permitting commercial operation. In brief, the requirement is intended to insure the proper development of the lease should the coal be of such thickness and quality and under such conditions as would justify continued operations on a commercial scale.

ARTICLE 4, SECTION 2.

ANNUAL RENT.

The rental of 25 cents per acre the first year and 50 cents per acre for each of the remaining five years and \$1 per acre per year thereafter is an almost nominal charge if coal is produced in any considerable amount. For example: Suppose that the leasing block consisted of 1,000 acres. The charge for rental or advance royalty at the end of the first year would be only \$250, and on the basis of 2 cents per ton royalty on the coal this would call for a production of only 12,500 tons for the whole year, and from the second to the fifth year, to wipe out the fixed rental charge, it would require a production of only 25,000 tons annually. Even though no coal be mined, the total rental for the five years on 1,000 acres would be only \$2,250, and it is likely that the lease would have been surrendered long before the end of the five-year period if coal in commercial quantities was not being produced. On a lease of 1,000 acres of coal land an output of 400 tons per day would be a moderate output. If the mine worked 250 days in the year, it would produce 100,000 tons. If development showed that part of the land under lease did not contain workable coal, then that part of the lease in 40-acre tracts could be surrendered by the lessee and the gross annual rental, equivalent to the advance royalty, could be lessened.

ARTICLE 4, SECTION 3.

ROYALTY.

The lease provides for—

* * * a royalty of 2 cents on every ton of 2,000 pounds of coal shipped or removed from the leased lands or manufactured into coke, briquettes, or other products of coal, or consumed on the premises, during the first five years succeeding the execution of this lease. * * *

The royalty for the opening period is made low in order to encourage the development of coal mines. A royalty of 5 cents per ton after the mine or mines on the lease have been opened up is also low in comparison with the size of royalty required in many coal fields of the United States. Except for some extremely low royalties in the middle West, the range is from 10 cents to 25 cents per ton. In the State of Washington, which is more directly competitive with Alaska, the royalties range from 15 to 25 cents per ton.

In some mines it may be necessary in determining the amount of coal extracted to measure the volume of the excavation rather than the weight of the coal, and the lease provides for such measurement. Special allowances may have to be made when the coal beds are very irregular and carry much impurity.

ARTICLE 4, SECTION 5.

CHARACTER OF REPORTS TO BE FURNISHED MONTHLY BY LESSEE.

The purpose of certain reports to be furnished by the lessee, in addition to those of coal shipped or moved from the premises, that is—

the number of mine cars of mine-run coal hoisted or trammed from each coal bed of each separate mine.¹

is to enable the checking of the amount of coal excavated or extracted from each bed, which may be in turn checked by underground measurements, and in general to permit the obtaining of a check of the weighed quantities of coal.

The provision requiring the lessee to make—

* * * a report showing the quantity, size, and character of coal shipped, used for power purposes and lease consumption; donated to employees, manufactured into coke, briquettes, or other products or by-products of coal; in storage on the premises, with the quantity of coal of various size added thereto and taken therefrom during the month

is almost self-explanatory. Although it may seem to be a burden on the operator, it is, on the other hand, only such information as a well-administered company would obtain for its own purposes.

ARTICLE 5.

PERIODS FOR READJUSTMENT OF ROYALTY.

As the rate of royalty during the first 25 years is low it is deemed advisable that there should be an opportunity for readjustment at the end of that period. It is expected that if bonds were issued, say at the end of the first five years of the development period, these bonds might run for 20 years, a customary period for mine bonds, and would be retired by the time the readjustment became effective. It will be observed, however, that the lease provides that in such readjustment the maximum limit of the royalty—

* * * shall not exceed 5 per cent of the average selling price of coal of like character at the mine, per ton of 2,000 pounds in the coal field embracing the tracts covered by this lease, as shown by the books of the lessees operating in said field, during a period of five years next preceding such readjustment.

By this provision, if the coal sold at \$2 per ton according to the books, the royalty would not exceed 10 cents per ton; or if it sold for an average of \$5 per ton at the mine, the royalty would not exceed 25 cents per ton. Such royalties under the conditions would be considered very moderate even at present. Undoubtedly when readjustments are made all conditions, including the market for coal and the competition from neighboring lessees, will be taken into consideration by the Secretary of the Interior.

¹ A definition of the term "mine" is given in article 8.

ARTICLE 6, SECTION 1.**WORKINGS NOT TO BE ABANDONED UNTIL EXAMINATION MADE.**

* * * No mine, entry, level, or group of rooms or workings shall be permanently abandoned and rendered inaccessible, save with the approval of the authorized representative of the lessor.

It is the expectation that in or near each important coal-mining district of Alaska there will reside a local representative of the Secretary who, on due notice, will make a prompt inspection and determine whether the operator shall be permitted to abandon certain workings. Any dispute arising may be submitted to a board of arbitration. (See art. 7.)

ARTICLE 6, SECTION 2.**PRELIMINARY PLAN OF MINING TO BE SUBMITTED IN ADVANCE OF OPERATIONS ON A COMMERCIAL SCALE.**

This section provides that the lessee—

* * * shall develop and mine the coal in the leased lands in accordance with a system to be shown by a preliminary plan on a scale of not more than two hundred (200) feet to the inch and a written description thereof, which plan and description shall be submitted for approval by the authorized representative of the lessor.

The provision may seem difficult where the structure of the coal measures is complicated, but on the other hand no thoughtful operator will consider it wise to start a mine without having some definite aim. Submission of this preliminary plan to the representative of the Secretary might in some cases lead to the obtaining of constructive advice which would be of value to the operator. The preparation of the preliminary plan would necessarily be preceded by some prospecting.

ARTICLE 6, SECTION 3.**MINING OF TWO OR MORE BEDS.**

Provision is made for systematically mining several beds at the same time, as follows:

Where mining operations are being carried on in a bed that lies either below or above another bed in which mining has been or is being carried on and in which the pillars have not been pulled, and where the vertical distance between the two beds is less than fifteen times the thickness of the lower of the two beds, the lessee shall, as far as practicable, so arrange the pillars that those in the lower bed shall be vertically beneath those in the upper bed. Where practicable by reason of either commercial or mining conditions, the available coal in the upper beds shall be exhausted before the coal in the lower beds is mined.

The purpose of the first provision is to prevent pillars from resting on spans and the breaking of spans under the weight. Such conditions have led to collapse of mine workings and serious subsidence of the surface in the anthracite district of Pennsylvania.

The last sentence of the paragraph lays down the general proposition that wherever such action is practicable the upper beds should be exhausted first. This is generally considered the best practice and should be followed wherever possible.

ARTICLE 6, SECTION 4.

FIFTY-FOOT BARRIER PILLARS AT THE BOUNDARY LINES.

The safety of the miners, as well as the property, demands that large barrier pillars be left between adjacent leases until the removal of the pillars by one or the other of the lessees becomes safe and expedient. The provision that the barrier pillar shall not be extracted until water that may have accumulated in adjoining abandoned workings has been lowered can in most cases be complied with, after permission has been obtained, by drilling holes through the pillar and drawing off the water in accordance with the methods followed in safe mining practice.

ARTICLE 6, SECTION 5.

LIMITATIONS OF COAL TO BE EXCAVATED IN ADVANCE WORKINGS UNDER ROOM-AND-PILLAR SYSTEM.

Under the "room and pillar," or any other method of mining that requires pillars of solid coal for the support of the overlying strata, the pillars must be large enough to furnish adequate support. In some parts of the United States it has been the practice to take so much coal in the advance workings as to bring undue strain on the pillars, roof, or floor, with resulting fracture of the roof, crushing of pillars, or squeezing up of the floor, endangering life and causing serious losses of coal. A "squeeze" in any mine is a grave reflection on the method of operation followed, yet "squeezes" are found in many coal-mining districts.

The percentages of extraction permitted for advance workings apply to different depths below the surface; they represent the maximum amount of extraction that should be permitted, and by no means represent the best practice, except the 20 per cent specified for more than 1,750 feet of depth. Many mines in the Connellsville, Pa., district having less than 600 feet of vertical depth of cover extract only 20 per cent of the coal by advance workings. The very best practice is to mine out all the coal by the long-wall method and use waste rock to stow or pack the excavations behind the face.

The provision that—

The said coal areas shall mean an area parallel with the dip or raise of the coal bed. The percentages of coal to be mined in the areas comprised in the advance workings as compared with the percentages of coal to be left standing in such workings * * *

means that the area of the pillars is not to be calculated on the basis of a horizontal plane, but in the plane of the coal bed itself. The further provision that the percentage of coal to be left standing—

* * * shall not be construed to mean the percentage of the total amount of the coal in any such area of any such bed, where such bed in such area is thicker than the height of any such workings * * *

means that the percentages of the areas must be considered and not the percentages of total coal. Obviously there is no difference between the two when the coal bed is not thicker than the height

of the excavated drifts, levels, gangways, rooms, or chambers, but if a room should be excavated to a height, say, of 8 feet when the coal bed is 10 or 20 feet thick, the thickness of the coal left up as a roof should be disregarded in figuring the strength of the pillars to resist crushing. The section also provides:

* * * nor shall such percentages of areas be held to include the coal extracted from the pillars in any such area, panel, or district of the mine, as it is the intent of the parties hereto that, save as otherwise provided in this lease, and except where the retention of pillars shall be necessary for the maintenance of main roads or passageways or for the protection of the property, all such pillars shall be mined and removed as rapidly as proper mining will permit.

It is not the intent to prevent the withdrawal of the pillars when the rooms or chambers are driven to their proper distances, if no pillars in overlying beds would be affected by such withdrawal.

ARTICLE 6, SECTION 6.

FIRES IN MINE PROHIBITED.

To reduce the danger to life and the possible loss of coal by fires, it is provided that the lessee—

shall not, save as hereinafter authorized, light, keep or maintain any fire in any mine or stripping, except as approved by the authorized representative of the lessor, or underground in any mine, or in contact with the coal in place or in or along the outcrop of any coal bed.

This provision is to prevent the starting of fires for heating purposes where they might cause a serious fire in the mine or coal bed. Fires of this origin were formerly frequent in certain coal districts of the United States. An exception that is permitted, subject to the approval of the authorized representative, is the use of a ventilating furnace as a temporary ventilating expedient. Such furnaces, however, are to be constructed or arranged in accordance with the specifications of article 13.

ARTICLE 6, SECTION 9.

SECOND EXIT TO SURFACE TO BE PROVIDED WHERE MORE THAN TEN MEN ARE EMPLOYED ON A SHIFT.

To provide for the escape of men in the event of an explosion or fire, the lessee must—

* * * where more than ten men are employed underground on any one shift in any separate mine, provide an escape way or second exit to the surface which shall be separated at the surface from the first exit by not less than 50 feet of strata in case of drift, slope, or tunnel workings, or in case of vertical shafts, or of inclined shafts having a pitch of more than 45 degrees, by not less than 200 feet of strata.

The specified distances between the openings are not recommended, but must be regarded as the minimum distances permissible. The less the pillar between the manway or escapeway and the haulage way is broken by crosscuts the better the protection afforded in case of fire or explosion. All such crosscuts, if not in active use, should have strong fireproof stoppings; if in active use, they should have emergency doors of fireproof material which may be closed in time of accident.

This section permits an alternative arrangement for an escapeway, as follows:

* * * An escapeway or outlet through an adjoining mine shall be regarded as a sufficient compliance with this requirement if kept at all times in proper condition for use.

It is not considered the best practice to provide an escapeway through an adjoining mine that is active and employs 10 or more men, as an explosion or fire in one mine endangers the safety of the lives of the men in the other. A far better plan is to have separate exits for separate mines. However, where coal measures are so complicated as in some of the Alaskan coal fields, conditions may arise under which a second exit through an adjoining active mine is the best arrangement that can be provided promptly; but such an escapeway should have emergency doors and "explosion barriers" so that a fire or explosion in either mine may not endanger the lives of men in the other.

ARTICLE 6, SECTION 11.

NO BUILDING OF INFLAMMABLE MATERIAL TO BE CONSTRUCTED WITHIN 75 FEET OF ANY MINE.

This section provides that the lessee—

shall not construct or maintain any structure of inflammable material within 75 feet of any mine opening; nor within said distance permit any structure of noninflammable material to be connected to any other structure by means of any structure or erection of inflammable material, or to be connected to any structure beyond said distance which shall be constructed of inflammable material, except as follows, that is to say:

(a) An open-timber framework, or head frame of timber may be constructed over a shaft, slope, or incline.

(b) The posts, studs, and rafters of any such structure may be of wood if the covering or lining is made of noninflammable material, but under no circumstances shall wood flooring be used, except in tipple and trestle structures.

Under these terms surface buildings that by burning may carry fire into the mine with disastrous results are not permitted. The engine house and other buildings should have a floor of concrete, cement, or packed dirt. Under the stated provisions the main timbers of a head frame, or the posts, studs, and rafters of a covered passage may be of wood, but either the framework must be left open or the cover or lining must be of noninflammable material, such as galvanized or painted corrugated iron or steel, or cement or plaster based on wire mesh. It is much better practice to fireproof even the frames, if of wood, with a coating of cement or plaster on a reinforcement of wire mesh, or, better still, to make these members of steel.

ARTICLE 6, SECTION 12.

MAIN INTAKE AND RETURN AIRWAYS TO BE SEPARATED BY NOT LESS THAN 50 FEET OF NATURAL STRATA.

This section provides that the lessee—

except in a prospect opening, shall separate the main intake and return airways and all workings parallel to such airways by not less than 50 feet of strata.

Pillars of such size between the main intake and return airways are provided in ordinary mine layouts, and in many parts of the United States the main pillars are made thicker or wider than 50 feet.

The provision insures an adequate separating pillar between the adjacent parallel entries and thus lessens the hazard from falls of roof and increases the protection in case of explosion or fire.

ARTICLE 6, SECTION 13.

FAN NOT TO BE PLACED IN DIRECT LINE WITH ANY MINE ENTRANCE.

This section treats of a ventilating fan and among other things provides that—

* * * the lessee shall not set same in line with the axis of any mine opening but shall place same at a distance of not less than fifteen feet from the projection of the nearest side of such opening, and shall provide explosion doors of the full area of the airshaft or airway, in direct line with any and all such mine openings in order to protect said fan or other mechanical means of air circulation in case of a mine explosion * * *

At many coal mines fans set in line with the main entrance have been demolished by the blast of an explosion, damaged beyond the possibility of repair, or so badly damaged as to cause serious delay. Offsetting the fan protects it and permits prompt renewal of the ventilating currents, so that men may be rescued who otherwise would be suffocated.

EDITORIAL NOTE.

In the printed pamphlet containing the foregoing regulations there appears, in addition, information on the occurrence and quality of Alaska coal deposits; the geologic distribution and composition thereof; a list of government publications relating to Alaska coal fields; a description of the Bering River and Matanuska coal fields with reference to geography, accessibility, climate, transportation and formation; a description of the leasing units with area thereof, accompanied by maps or diagrams; and method of developing coal mines in said fields.

COAL LAND LEASES IN THE TERRITORY OF ALASKA.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 13, 1916.

Notice is hereby given that section 3 of the General Regulations issued May 18, 1916 [45 L. D., 113], under the Coal Leasing Act of October 20, 1914 (38 Stat., 741), is hereby modified and the period of time for filing applications under said act extended from June 30 to August 1, 1916.

Respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

FRANKLIN K. LANE.

FRANK BARNES.

Decided May 20, 1916.

ENLARGED HOMESTEAD—SECTION 6—AREA OF CULTIVATION.

The provision in the act of June 6, 1912, requiring "double the area" of cultivation in the case of entries under section 6 of the enlarged homestead act, contemplates double the proportional part or fraction required to be cultivated in the case of other entries—that is, not less than one eighth of the area during the second year of the entry and not less than one fourth thereafter.

SWEENEY, Assistant Secretary:

January 31, 1916 [unreported], the Department affirmed decision of the Commissioner of the General Land Office holding for cancellation and rejecting final proof on Frank Barnes's homestead entry for W. $\frac{1}{2}$, Sec. 11, T. 34 S., R. 24 E., S. L. M., Salt Lake City, Utah, on the ground of insufficient cultivation.

This entry was made under section 6 of the act of February 19, 1909 (35 Stat., 639), for 320 acres. The final proof showed cultivation of less than 80 acres. The Commissioner held:

When the law states that during the second year of the entry at least one-eighth of the area of the entry must be cultivated it does not mean that a less amount of the land, if cultivated during that period, would meet the requirement of the law; and likewise the law's requirement that at least one-fourth of the area of the entry must be cultivated during the third, fourth and fifth years, and until the submission of proof, means what it says.

The act of June 6, 1912 (37 Stat., 123), amending sections 2291 and 2297, Revised Statutes, among other things, provided:

That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area

of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required.

In homesteads other than under section 6 of the enlarged homestead act cultivation of one-sixteenth and one-eighth of the area only is required in the second and third years, but on entries "under section six of the enlarged homestead law double the area" is required. To give this provision effect "area" must be understood as meaning proportional part or fraction. While this is an unusual sense to be given to the word, it is necessary to so interpret it, as otherwise the provision is mere surplusage, for one-sixteenth and one-eighth of the enlarged homestead of 320 acres is necessarily double the area of an ordinary homestead of 160 acres. Giving the word "area" this sense also makes the act of June 6, 1912, *supra*, harmonious with that of February 11, 1913 (37 Stat., 666). The latter act amended section 4 of the enlarged homestead law to require cultivation of like proportions of entries thereunder, reducing the required cultivation to one-sixteenth and one-eighth the second and third years and continuously to final proof, thus requiring but 40 acres cultivated the third year on entries under section 4. This interpretation of "double the area" in the act of June 6, 1912, *supra*, requires cultivation of 80 acres on homesteads under section 6. This preserves the relative proportions of cultivation required by the original enlarged homestead act between entries under section 4 on which residence is required and under section 6 where it is not. The conclusion that the law had not been complied with because 80 acres (one fourth) had not been cultivated was correct.

Department decision herein of January 31, 1916, is revoked and recalled and this decision will take its place. As a correct conclusion was reached by the Commissioner, his decision is affirmed.

MODIFICATION OF COAL LAND WITHDRAWALS.

EXECUTIVE ORDER.¹

DEPARTMENT OF THE INTERIOR,
Washington, May 20, 1916.

MY DEAR MR. PRESIDENT:

Under several acts of Congress granting public lands to aid in the construction of railroads, lands containing deposits of coal and iron passed to the grantees.

In a case involving such a grant to the Northern Pacific Railroad Company, I have found, under the law and the long-established

¹ See Administrative Order, p. 152.

practice and construction of this Department, that the company is entitled to select as indemnity for losses, lands containing coal. Some of these lands, however, have been withdrawn pending classification as to their coal or noncoal character by various Executive orders, the purpose of the classification being, of course, to advise this Department as to the true character of the land in aid of their proper disposition, as well as to fix a value on the coal deposits, if any there be, subject to sale under the coal-land laws.

However, as above stated, lands granted to the company by Congress belong to it, whether they contain coal or iron, or not, and should be patented, not only because the company is entitled thereto, but to the end that the lands may become subject to taxation by the States in which they are situated.

The terms of said orders of withdrawal are such that I do not feel warranted in issuing these patents without a modification thereof, and I therefore request that you authorize me to issue patents for such land, if the selections be found otherwise regular, and that such authority be indicated by your approval of this communication.

Cordially yours,

FRANKLIN K. LANE.

The PRESIDENT,

The WHITE HOUSE.

Approved May 22, 1916:

WOODROW WILSON,

President.

RAILROAD GRANT—INDEMNITY SELECTIONS—COAL LANDS.

ADMINISTRATIVE ORDER.

DEPARTMENT OF THE INTERIOR,

Washington, May 23, 1916.

Under the authority of the President's order of May 22, 1916 [45 L. D., 151], indemnity selections made under grants to railroad companies for lands embraced in areas withdrawn for coal classification, under the act of June 25, 1910 (36 Stat., 847), will be received, filed and patented, if in all other respects regular.

FRANKLIN K. LANE.

NORTHERN PACIFIC RY. CO.

Decided May 23, 1916.

NORTHERN PACIFIC INDEMNITY SELECTIONS—COAL LANDS.

Coal lands are subject to indemnity selection by the Northern Pacific Railway Company under the act of July 2, 1864, and the joint resolution of May 31, 1870, in lieu of nonmineral lands lost to the company's grant.

LANE, *Secretary*:

The Northern Pacific Railway Company has filed a motion for rehearing in the matter of its selection list No. 97, filed August 18, 1911, at Great Falls, Montana, for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 29, T. 18 N., R. 3 E., M. M., which was ordered rejected by the Department's decision of January 29, 1916 (not reported).

The above tract is located within the second indemnity limits of the grant to the Northern Pacific Railway Company, as fixed by the act of July 2, 1864 (13 Stat., 365), and the joint resolution of May 31, 1870 (16 Stat., 378). This township was withdrawn October 13, 1906, from filing or entry under the coal land laws, and from all entry November 7, 1906, the withdrawals being modified to apply to coal entries only, December 17, 1906. The entire township was classified as coal land at the minimum price, June 12, 1907, it being reclassified and restored to entry as coal land February 4, 1911, the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ being returned at \$80 per acre and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ at \$75 per acre. In its decision of January 29, 1916, the Department affirmed the decision of the Commissioner dated May 24, 1915, holding in effect that the Northern Pacific Railway Company was not entitled to make indemnity selections based upon a nonmineral base for lands classified as coal.

The grant to the Northern Pacific Railroad Company, the predecessor in interest of the Northern Pacific Railway Company, was made by the act of July 2, 1864 (13 Stat., 365). Section 3 provided that certain alternate odd sections not mineral in character should be granted to the company. It further provided:

Whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . . *Provided, further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal.

The joint resolution of May 31, 1870, extended the indemnity limits for 10 miles beyond the limits prescribed in the act of 1864, the company to take the same character of land as described in the original grant.

Under the terms of section 3 of the act of July 2, 1864, it is clear that the railroad company took coal and iron lands within its primary or grant limits. It could not base an indemnity selection upon the claim that the land was coal or iron in character, for the reason that such lands were not lost to it as part of its grant. The part of

the section authorizing indemnity selections simply stated that "other lands" should be selected by the Company in lieu of those lost. The other lands necessarily were to be of the same character as those contained within the grant or primary limits, and as such fall within the proviso that all mineral lands were excluded from the operation of the grant, the word "mineral," however, not to be held to include iron or coal. It follows, therefore, that under the original grant, and as extended by the joint resolution, the Northern Pacific Railway Company is entitled to take coal lands under its indemnity selection.

The above construction of the statute is in harmony with its legislative construction, as reflected in various acts of Congress and also with the prior practice of the land department. The act of February 26, 1895 (28 Stat., 683), authorizing the examination and classification of lands as to certain land districts in Montana and Idaho, "within the land grant and indemnity land grant limits of the Northern Pacific Railway Company," as defined in its granting acts, provided in section 3 that lands classified as mineral should be opened to exploration, location and purchase under the provisions of the mining laws. Section 3 then further provided:

That the word "mineral" where it occurs in this act, shall not be held to include iron or coal.

This act is a legislative recognition that in the classification of lands within the indemnity limits, neither iron or coal should be considered as fixing a mineral character upon the land. The position of Congress has been emphasized by its action in the Sundry Civil Act of June 25, 1910 (36 Stat., 703, 739), appropriating the sum of \$30,000 to complete the examination and classification of lands, as provided in the act of February 26, 1895, *supra*. Similar appropriations have since that time been made (See 36 Stat., 1307; 37 Stat., 609; 38 Stat., 272, 571, 1148).

In Northern Pacific Railway Company (39 L. D. 314), decided October 24, 1910, it was distinctly stated that it had been the uniform rule of administration in the General Land Office that coal lands might be selected by the Northern Pacific Railway Company in lieu of nonmineral losses. Secretary Ballinger there further said, at page 315:

In this connection, however, it may not be improper to say that the ordinary, or general, indemnity privilege accorded by said act is to cover losses of lands which "shall have been granted, sold, reserved, occupied by homesteaders, or preempted, or otherwise disposed of," at the date of the definite location of the road, and is confined to "other lands," designated by odd numbers, and within certain defined limits. This privilege is a very different one from that accorded on account of mineral losses, which, as has been seen, is in terms limited to "agricultural lands," admitting that, as coal lands in place pass under the granting clause of the act, it is reasonable to assume that it was intended to confer upon the company the right to select coal lands as "other lands" under the indem-

nity privilege, it by no means follows that such lands are "agricultural lands," subject to selection on account of mineral losses. Indeed, it would seem that, if Congress had intended to make the indemnity privilege on account of mineral losses the same as for other losses, there was no necessity for a separate provision excepting mineral lands from the grant, and special provision for indemnity privilege on account of such losses.

In the Department's instructions of July 23, 1910 (39 L. D., 111), under the operation of the act of June 25, 1910, *supra*, to complete the Northern Pacific classification, it was distinctly stated, at page 118, that the word "mineral" should not be held to include coal or iron.

From a construction of the original act itself, therefore, and its subsequent adjudication by this Department and the later legislation of Congress, it is clear that the Northern Pacific Railroad Company may select coal lands within its indemnity limits where a nonmineral base is offered. The lands here involved have been classified as coal and restored to entry and the indemnity selection was, accordingly, properly filed.

The Department's prior decision of January 29, 1916, is accordingly vacated and recalled, the decision of the Commissioner is reversed, and the selection will be approved, in the absence of other objection.

NORTHERN PACIFIC RY. CO.

Decided May 23, 1916.

NORTHERN PACIFIC INDEMNITY—COAL LAND—ACT OF MARCH 3, 1909.

The act of July 2, 1864, and the joint resolution of May 31, 1870, making a grant to the Northern Pacific Railroad Company, are in no wise amended or modified by the act of March 3, 1909, providing for the issuance of restricted patent to agricultural entrymen of lands subsequently classified, claimed, or reported as valuable for coal.

LANE, *Secretary*:

The Northern Pacific Railway Company has filed a motion for rehearing in the matter of its selection list No. 376, filed November 10, 1909, at Miles City, Montana, for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 35, T. 2. S., R. 51 E., M. M., within the second indemnity limits, under the act of July 2, 1864 (13 Stat., 365), and the joint resolution of May 31, 1870 (16 Stat., 378), in which the Department, by its decision of January 29, 1916 (not reported), held that the company should receive the surface patent provided for in the act of March 3, 1909 (35 Stat., 844).

The above lands were withdrawn from coal entry by the Secretary of the Interior April 20, 1910, and are included in coal land withdrawal Montana No. 1, made by executive order of July 9, 1910, but have not yet been classified.

In the decision now under review the Department held that the original grant to the railroad company had been modified by the act of March 3, 1909, *supra*, and that the railroad company could receive only a surface patent.

By the Department's decision upon motion for rehearing in the case of Northern Pacific Railway Company, Great Falls 023024 (45 L. D., 152), it has been held that the Northern Pacific Railway Company may make indemnity selection, based upon a nonmineral loss, of coal lands.

Section 20 of the act of July 2, 1864, *supra*, provided as follows:

That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.

In its decision of January 29, 1916, the Department held that, under the above provision, Congress had retained the right to modify the grant to the Northern Pacific Railroad Company, and that even in the absence of such a provision Congress would still have that right, which had been exercised in the passage of the act of March 3, 1909.

It is not here necessary to determine as to the extent of the power of Congress of modifying or amending the grant made to the Northern Pacific Railroad Company. The real question presented is as to whether the act of March 3, 1909, in any way amended or modified the granting acts to the Northern Pacific Railroad Company of July 2, 1864, and May 31, 1870.

The act of March 3, 1909, authorized any person who had in good faith located, selected or entered, under the land laws of the United States, any lands which subsequently are classified, granted or reported as being valuable for coal, to receive a patent reserving the coal deposits to the United States. It is well known that this act was a remedial one, passed for the benefit of numerous good-faith entrymen, etc., who had taken up land without knowledge of its coal character and who, under the then-existing laws, upon proof of such coal character, would necessarily lose their claims. It was for the relief of such parties that the act was passed. At the very time of its enactment, however, both Congress and the land department recognized the fact that the Northern Pacific Railroad Company could make indemnity selections of coal land.

The act of March 3, 1909, was general in character and can not be construed as indicating the purpose of Congress to modify or alter a grant made by former special acts. The act of March 3, 1909,

has no operation upon Northern Pacific indemnity selections, since the railroad company has a right to make such selection, whether the land is coal in character or not.

The previous decision of the Department is, accordingly, vacated and recalled, the Commissioner's decision reversed, and the selection will be approved, in the absence of other objection, as directed in the administrative order of even date herewith (45 L. D., 152).

SANTA FE PACIFIC R. R. CO.

Decided May 23, 1916.

WITHDRAWN OR CLASSIFIED COAL LANDS—FOREST LIEU SELECTION.

There is no provision of law authorizing forest lieu selection, under the act of June 4, 1897, of lands which have been withdrawn or classified as coal.

SWEENEY, Assistant Secretary:

This is an appeal by Inez F. Palmer, attorney in fact for the Santa Fe Pacific Railroad Company, from a decision of the Commissioner of the General Land Office dated June 29, 1915, rejecting forest lieu selection 018776 made under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33, T. 26 N., R. 56 E., M. M., Glasgow land district, Montana.

The lands in question were withdrawn as coal lands June 9, 1910. September 19, 1912, the land was covered by Northern Pacific Railway selection 018391, which appears to be still pending. On November 18, 1912, the Santa Fe Pacific Railroad Company, by its attorney in fact, Inez F. Palmer, filed forest lieu selection 018776.

In the decision complained of, the Commissioner rejected the forest lieu selection for conflict with the prior selection of the Northern Pacific Railway Company and for the further reason that there is no provision of law for the allowance of forest lieu selections upon lands withdrawn as coal lands.

The act of June 22, 1910 (36 Stat., 583), provides that lands which have been withdrawn or classified as coal lands shall be subject to surface appropriation under the homestead laws, the desert land law, by selection under the Carey Act, and to withdrawal under the Reclamation Act, and the act of April 30, 1912 (37 Stat., 105), provides that such lands shall be subject to surface appropriation by State selections and under the act providing for the sale of isolated tracts. There is no provision of law, however, for the appropriation of lands withdrawn as coal lands under the exchange provision of the act of June 4, 1897, *supra*.

The decision appealed from is accordingly affirmed.

INTERNATIONAL ASBESTOS MILLS AND POWER CO. ET AL.

Decided May 25, 1916.

CONFLICTING MINERAL APPLICATIONS—ADVERSE PROCEEDINGS.

A senior applicant for patent under the mining laws does not by the filing of an adverse claim against a conflicting junior application, and the institution of suit thereon, abandon or forfeit any rights under his senior application; and the pendency of such adverse suit does not operate as a stay of proceedings in the land department on the junior application pending determination of the suit.

CONFLICTING APPLICATIONS UNDER THE MINING LAWS.

An area included in a pending application under the mining laws can not properly be included in a subsequent mineral application.

SWEENEY, Assistant Secretary:

This is an appeal by the International Asbestos Mills and Power Company and the Northwestern Asbestos Mills Company from the decision of the Commissioner of the General Land Office of July 17, 1915, conditionally holding for rejection their application 07329 for patent under the mining laws to the Bedford No. 4 oil placer, embracing the SW. $\frac{1}{4}$, Sec. 6, T. 39 N., R. 78 W., 6th P. M., Douglas, Wyoming, for conflict with prior mineral application 06022 for the Frederick placer.

It appears from the record before the Department that on May 11, 1912, William G. Henshaw, O. H. Shoup, the Midwest Oil Company, and five other persons filed application 06022 for patent to the said Frederick placer, embracing lots 6 and 7 and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ (fractional SW. $\frac{1}{4}$) of said Sec. 6; that claim purports to have been located February 22, 1910, and the area included therein is alleged to be valuable on account of petroleum deposits. Notice of this application was contemporaneously published and posted for a period of 60 days, commencing May 15, 1912, and proof of such publication and posting was filed in the local office July 25, 1912. No adverse claim was filed during said period of publication.

April 17, 1914, the appellants filed application 07329 for patent to the Bedford Nos. 1, 2, and 4 placer mining claims, each for 160 acres, the latter including the said SW. $\frac{1}{4}$, Sec. 6. Said claim purports to have been located January 10, 1906, and it is alleged that the area included therein is valuable for oil. Notice of the application is shown to have been posted on the claim April 2, 1914, and publication of the notice was made for a period of 60 days, commencing May 5, 1914.

During the period of publication of the application last named and on June 30, 1914, the Fitzhugh Oil Company and the said Midwest Oil Company and O. H. Shoup, then the record claimants of the Frederick placer, filed an adverse claim against the application

of appellants, in so far as it included the Bedford No. 4 claim. It also appears that suit was commenced in support of said adverse claim July 24, 1914, in the United States district court for the district of Wyoming; that answer to the complaint was filed by the Bedford No. 4 claimants; and that the matter was on June 12, 1915, at issue before said court.

Upon considering appellants' application, the Commissioner, by decision of March 27, 1915, held that the local officers erroneously accepted and issued notice on said application as to the Bedford No. 4 claim, because of the pendency of the prior Frederick application, and required the Bedford No. 4 claimants to show cause why the application should not, to the extent of that claim, be rejected on account of conflict with the Frederick application. The Bedford No. 4 claimants responded, setting up the following as reasons why their application should not be rejected: (1) Because the Frederick claimants were, at the date of the Bedford No. 4 application, guilty of laches in the completion of their application; (2) that the Bedford No. 4 application was accepted and notice thereof permitted to go to publication, posting and proof; (3) that adverse claim was filed against the Bedford No. 4 application by the opposing claimants and suit instituted thereon and that all rights, as between the contending parties, can be better determined in that suit; (4) that the Frederick application was erroneously accepted by the local officers, because on September 27, 1909, and prior to the date of the Frederick location, as well as the date of the application, the land had been withdrawn from occupation and entry and hence was not subject to appropriation by the Frederick claimants; (5) that the certificate of location of the Bedford No. 4 claim was dated and filed long prior to said withdrawal; and (6) that the Frederick claimants forfeited all rights under their prior application by the filing of said adverse claim and the institution of suit thereon.

Appellants therefore prayed that the Frederick application be rejected and canceled of record and that all proceedings on the Bedford No. 4 application be stayed pending final determination of the suit.

The Commissioner by the decision here appealed from found that the allegation of want of diligence on the part of the Frederick claimants was not well grounded; that the filing of the adverse claim and the institution of suit thereon by the Frederick claimants did not work a forfeiture or abandonment of any rights they had under their application; that the Bedford No. 4 claimants and junior applicants having failed to take appropriate and timely steps to protect themselves against the senior application, can not now be allowed to avail themselves of the suit instituted by the senior applicants as a ground for stay of proceedings in the land depart-

ment; and that the adverse claim and suit filed and instituted by the senior applicants is not such an adverse claim and suit as is contemplated by section 2326, Revised Statutes, and therefore does not of itself operate to stay proceedings. The showing was, therefore, declared to be insufficient and mineral application 07329 was held for rejection as to the Bedford No. 4—

unless, within thirty days from notice hereof, applicants under said mineral application 07329 shall file proper application of contest, traversing and challenging what is shown by the record of mineral application 06022, with regard to posting and publication of a notice of application for patent.

It appears that by departmental order of September 27, 1909, all public lands in the township wherein the land here involved is situated, were temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws, subject, however, to all locations and claims existing and valid on the date of the order which locations and claims, it was declared, might proceed to entry in the usual manner after field investigation and examination. By Executive order of July 2, 1910, the said withdrawal of September 27, 1909, was ratified, confirmed and continued in full force and effect and subject to the provisions of the act of June 25, 1910 (36 Stat., 847), the lands described therein, including that here in question, were withdrawn from settlement, location, sale or entry and reserved for classification.

By section 2 of the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), it is provided:

That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further*, That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten.

While the Bedford No. 4 claim is asserted to have been located January 10, 1906, there is nothing in the record that even suggests that at the date of the 1909 withdrawal, or in fact at any time, any work had been commenced, or if commenced, had been thereafter diligently prosecuted, by the Bedford No. 4 claimants, to a discovery of oil on said claim. Indeed, the appellants' showing tends rather to negative the idea that an actual discovery of oil or gas has been made upon the area, inasmuch as appellants do not profess to have done any work upon the claim prior to February 17, 1914 (a point

of time over 4 years and 4 months subsequent to the date of the 1909 withdrawal, and over 3 years and 7 months subsequent to the 1910 withdrawal), other than to sink at points within the limits of the three claims embraced in the application a number of "prospect holes," in "some" of which, it is asserted, there were shown "signs of oil." It seems almost superfluous to say that a showing of this character could not be properly accepted as a basis for an application for patent to the tract in question in the face of said withdrawals.

The fact that the Frederick claimants and senior applicants for the land filed an adverse claim against appellants' junior application and instituted suit thereon, does not, in the least, affect the jurisdiction of the Department to determine the validity of the junior application. The Department has repeatedly, and, it is believed, uniformly, held that an area included in a pending application for patent under the mining laws cannot properly be included in a subsequent mineral application by another person. The Gunnison Crystal Mining Company (2 L. D., 722); Aspen Mountain Tunnel Lode No. 1 (26 L. D., 81); John McConaghy (29 L. D., 226); The Wanda Gold Mining Company *v.* The E. F. C. Mining and Milling Company (31 L. D., 140).

This rule has its foundation, in part, in the obvious possibility of confusion and error that might result from the accumulation of a number of mineral applications for the same ground. It is incorporated in paragraph 44 of the mining regulations in force at the time the appellant's application was presented, which reads as follows:

Before approving for publication any notice of an application for mineral patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any land embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that notice of a mineral application should not, for this or other reasons, be approved for publication, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

As to persons asserting claim to a tract antecedent to the presentation of mineral application therefor by another person or persons, the rule finds ample justification in the provisions of sections 2325 and 2326, Revised Statutes, wherein it is declared that if no adverse claim is filed against a mineral application during the prescribed period of posting and publication, it shall be assumed that no adverse claim exists, and, all else being regular, that the applicant is entitled to a patent to the land; and that failure of an adverse claimant to seasonably institute judicial proceedings against an ap-

plicant and prosecute the same with reasonable diligence to final judgment, shall be a waiver of his adverse claim.

In view of the foregoing it must be held that the local officers were without authority to receive, or to authorize the publication of notice of the appellant's application. Moreover, the Frederick claimants were entitled to whatever protection the failure of appellants to file an adverse claim against the Frederick application afforded them. They were not required to adverse the junior application and, hence, could not be regarded as having lost or forfeited any rights to the land had they failed to adverse it. The fact that they did file a so-called adverse claim against the erroneously allowed junior application and commence suit thereon, in nowise affected their rights. *Morgan et al. v. Antlers-Park-Regent Consolidated Mining Company* (29 L. D., 114); *Owers v. Killoran et al.* (Id., 160). For the same reason the mere fact that the so-called adverse claim was filed and suit thereon instituted, affords no legal basis for a stay of proceedings in the land department on the junior application pending determination of the suit.

Appellant cites *The Wanda Gold Mining Company v. The E. F. C. Mining and Milling Company*, *supra*, to support the contention that in any event the adverse suit instituted by the appellants against the Frederick claimants should be recognized as warranting a stay of proceedings. It is true that in the case cited the Department directed that the so-called adverse suit instituted against a junior patent applicant, by one who had a prior pending mineral application for the same land, "be recognized as a stay of proceedings in the case until the said suit shall have been finally determined." In that case, however, the land was, contrary to the facts herein, unwithdrawn and the junior application was irregular only to the extent that it included an area embraced in a senior application of record only in the local office, the said application having been declared finally rejected and canceled of record in the General Land Office four days prior to the presentation of the junior application, the publication of notice of which was not commenced until more than a month after the notice of the rejection of the senior application was received at the local office. In the case at bar, however, the senior application was at the time of the presentation of the junior application pending of record, both in the General Land Office and in the local office, and notice thereof had sometime theretofore been published and posted. Moreover, the land involved in the present case was not, so far as the record shows, subject to disposition under the junior application. The case cited, therefore, is not in point.

Under the circumstances disclosed, therefore, no valid reason exists for a suspension of action on appellant's application. It will, there-

fore, be, adjudicated by the land department notwithstanding the pendency of the suit. The decision appealed from is accordingly affirmed.

ESTHER D. SMITH.

Decided May 26, 1916.

SOLDIERS' DECLARATORY STATEMENT—EXTENSION OF TIME.

The land department has no authority to extend the statutory period of six months from the filing of a soldiers' declaratory statement within which to make entry and settlement.

ENTRY AND SETTLEMENT UNDER SOLDIERS' DECLARATORY STATEMENT.

By failing to make entry and settlement within six months from the filing of a soldiers' declaratory statement the declarant loses all rights thereunder and exhausts the right to file declaratory statement; but where such failure is due to sickness or climatic conditions, the declarant may be permitted to make homestead entry of the land after the expiration of that period, in the absence of any intervening adverse claim.

SWEENEY, *Assistant Secretary*:

This is an appeal by Esther D. Smith from the decision of the Commissioner of the General Land Office of December 18, 1915, denying her application for extension of time beyond the six months' period allowed by sections 2304 and 2309, Revised Statutes, within which to establish residence upon lot 4, Sec. 4, lots 1 and 2, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 5, T. 24 S., R. 65 W., SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 32, T. 23 S., R. 65 W., 6th P. M., Pueblo, Colorado, included in a soldiers' declaratory statement filed by her as the widow of one William H. Smith, who is alleged to have served for a period of more than ninety days in the United States Navy during the war of the rebellion.

The said declaratory statement was filed by the agent of Mrs. Smith July 29, 1915. November 15, 1915, she forwarded to the local office, where it was received November 18, 1915, a communication which reads as follows:

As a widow of a Naval officer I filed a declaratory claim by an agent to a homestead in your District August, 1915, intending to carry out provision of the contract. For the following reasons I ask an extension until spring. Owing to a recent illness from which I am recovering it would not be advisable to make the journey to Pueblo and return during the severe weather of December. Secondly, I do not feel financially able at this time to make the trip and return home as I would be obliged to do on account of the season of the year. I want to remain and go on the claim when I file and thus save a trip in severe weather and the extra expense.

The Commissioner by the decision here appealed from, construing said communication to be an application for "an extension of time

for one year and eight months for beginning residence on the land in addition to the six months allowed by law," denied the same on the ground that there is no authority for allowing an extension of time in such cases.

In her appeal, which is informal, the applicant declares that it was not her intention to ask for an extension of time for one year and eight months, but merely an "extension from January 29, 1916, to May 29, 1916, in which to appear in person, make payment, and move on the land," and that she sought such extension under the provisions of paragraph 35, departmental circular of January 2, 1914 (43 L. D., 1, 13).

By section 2309 of the Revised Statutes it is provided that:

Every soldier, sailor, marine, officer, or other person coming within the provisions of section twenty-three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in preemption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlement and improvements on the same, and thereafter fulfill the requirements of the law.

The time prescribed for the making of entry and commencement of settlement and improvements on the land so filed upon is six months from date of filing. See section 2304, Revised Statutes.

Paragraph 35 of departmental circular of January 2, 1914, *supra*, upon which Mrs. Smith bases her application for an extension of time, reads as follows:

Where, for climatic reasons, or on account of sickness, or other unavoidable cause, residence cannot be established on the land within six months after the date of the entry, additional time, not exceeding six months, may be allowed.

This regulation is based upon section 2297, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat., 123), which reads as follows:

If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

The term "settler," as used in the second proviso to the section above quoted, manifestly has reference to a person who prior to seek-

ing permission to exercise the privilege accorded by said proviso, had filed the affidavit prescribed by section 2290, Revised Statutes, and acquired the status of a homestead entryman. Mrs. Smith did not at the time of her application for an extension of time, nor, so far as anything to the contrary is disclosed by the records and files of the General Land Office, does she now occupy such a status. On the other hand, she appears to be merely one who has declared an intention to claim and enter a certain tract under the homestead laws. The Commissioner of the General Land Office is without authority under said proviso, or under any other provision of the homestead law, to grant an extension of time beyond that prescribed by section 2304, Revised Statutes, within which a declarant under section 2304 and 2309 may make settlement upon the tract described in the declaratory statement. The application, therefore, was for this reason properly rejected.

The decision appealed from is accordingly affirmed.

In this connection attention is directed to circular of May 17, 1873 (3 Copp's Land-Owner, 115), wherein it is declared that—

where a party who, having filed, in person or by an agent, a Homestead Declaratory Statement upon a tract of land, fails by reason of sickness, misfortune, or any insurmountable cause, to make a homestead entry thereof within six months from the date of said filing, such party will be held to have *exhausted his right to file a Declaratory Statement* under the said act, but will be allowed to make a *Direct Homestead Entry* of the tract so filed upon, if no valid adverse right thereto shall have intervened; or, in case such right has intervened, to enter any other tract of the public lands subject to such entry: *Provided*, That such party make affidavit before you, or either of you, that it was his *bona fide* intention at the date of filing the said Declaratory Statement to follow the same by a personal entry of the land therein described within six months from the date thereof; that he was prevented from so doing by an insurmountable cause—stating the cause; and in case he seeks to enter a tract other than that filed on—which will only be allowed when a valid adverse right shall have attached to the tract so filed on—that he has not sold, bartered, or in any way whatever alienated for gain or profit his right to file a Declaratory Statement under the said law, or his claim or right under his filing, or to the land covered thereby.

The claimant will be afforded an opportunity, if she so desires, to make a showing under this circular and if the same be sufficient and there be no adverse claim to the land, she will be permitted to make homestead entry of the land if she has not already done so. [See paragraph 5 of circular of December 15, 1882, 1 L. D., 648.]

McGLYNN v. OREGON AND CALIFORNIA R. R. CO.

Instructions, May 29, 1916.

SUIT TO VACATE PATENT—ACT OF MARCH 2, 1896.

Where the patent issued upon a railroad indemnity selection erroneously includes a tract not embraced in that selection, but embraced in another indemnity selection by the same company, then pending but subsequently rejected, the patent as to that tract is voidable and not void, and suit to vacate and annul the patent as to said tract must be brought within the period fixed by the act of March 2, 1896.

SWEENEY, *Assistant Secretary*:

Your [Commissioner of the General Land Office] letter of March 29, 1916, recommending that the Attorney-General be requested to institute suit against the Oregon and California Railroad Company for the recovery of the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, T. 18 S., R. 7 W., W. M., Roseburg, Oregon, land district, which was erroneously included in patent to said company, under date of March 3, 1893, has been duly received.

This land is within the indemnity limits of the grant to said railroad company, by act of July 25, 1866 (14 Stat., 239); and it appears from your letter that the company applied to select the same, together with other land, in 1886, and the action of the local officers in rejecting the application was affirmed by the Commissioner of the General Land Office, February 20, 1895, and the case closed December 13, 1895.

While this application was pending, patent issued to the company upon another selection by it, which patent erroneously included the land in question. Thomas F. McGlynn made homestead entry for this land March 13, 1909, and by departmental decision of August 18, 1913, the action of your office in rejecting the offer of base by the railroad company for indemnity selection of the land, and permitting the homestead entry of McGlynn to remain intact, was affirmed. It is suggested by you that the United States is obligated to McGlynn to endeavor to clear the record of the company's title to the land; and it is for this purpose that it is recommended that the Attorney-General be requested to institute suit against the company.

The question arises whether the proposed action is barred by the act of March 2, 1896 (29 Stat., 42), which provides:

That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent.

If the patent to the company, in so far as the same included the land in question, is voidable, and not absolutely void, there is no doubt that the proposed action is barred by this act. The jurisdic-

tion of the land department was invoked by an application to select this land, and the same being within the indemnity limits of the grant to said company, full authority existed for the conveyance thereof by this Department. The presumption is that all necessary preliminary steps to the issuance of the patent were duly taken.

In 32 Cyc., 1032, it is said:

Under the rule that public officers are presumed to do their duty, the presumption is that all necessary preliminary steps to the issuance of a patent have been taken, and that the patent was regularly issued and is valid and passes the legal title.

On page 1038 of the same volume is the following:

A patent to land, the disposition of which the land department has jurisdiction, is both the judgment of the Department as a quasi-judicial tribunal and a conveyance of the legal title to the land, and hence is conclusive in a court of law, and as against all persons whose rights did not commence previous to its emanation, as to the land thereby conveyed, the qualifications of the person to whom the patent was issued, the title of the patentee, and his performance of the conditions required by the act of Congress under which the patent was issued.

In the case of *Smelting Co. v. Kemp* (104 U. S., 636, 640), the court said:

The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with.

In the early case of *Hoofnagle v. Anderson* (7 Wheaton, 248), the Supreme Court of the United States, speaking through Chief Justice Marshall, said:

It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date and has always been held conclusive against all those whose rights do not commence previous to its emanation.

In the case of *Germania Iron Co. v. U. S.* (165 U. S., 379), the court said:

By inadvertence and mistake a patent in this case has been issued, and the effect of such patent is to transfer the regular title and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact.

The Supreme Court of the United States in the case of *Burke v. Southern Pacific R. R. Co.* (234 U. S., 669), answered certain inquiries certified to it by the Circuit Court of Appeals, one of which inquiries was as follows:

Does a patent to a railroad company under a grant which excludes mineral land, as in the present case, but which is issued without any investigation on

the part of the officials of the land department or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

The Supreme Court answered this question as follows:

A patent issued under such circumstances is irregularly issued, undoubtedly so, but as it is the act of a regularly constituted tribunal and is done within its jurisdiction, it is not void, and therefore passes the title (*Noble v. Union River Logging Railroad*, 147 U. S., 165, 174-175), subject to the right of the Government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. (*McLaughlin v. U. S.*, 107 U. S., 526); (*Western Pacific R. R. v. U. S.*, 108 U. S., 510).

From the foregoing, it will be seen that the legal title to the land vested in the railroad company upon the issuance of the patent, and the same is therefore voidable, and not absolutely void. It follows that the action proposed by you is barred by the act of March 2, 1896, *supra*, and no useful purpose would be served by the institution of such action.

McLAUGHLIN v. STEINBERGER.

Decided May 29, 1916.

PRACTICE—CONTEST—MOTION FOR CONTINUANCE.

A motion for continuance in a contest proceeding, based on an allegation of inability to procure the attendance of witnesses at the time and place set for hearing, should set out in substance the matter which it is expected the absent witnesses would testify to, divulge the names of the witnesses, aver that their absence is not due to collusion and consent of contestant, and state that the application for continuance is not for the purpose of delay.

MOTION FOR CONTINUANCE—STAY OF PROCEEDINGS—DEFAULT.

The filing of a motion for continuance by a contestant does not act as a stay of proceedings; but contestant must appear at the time and place set for hearing and be ready to proceed with the case in event the application for continuance is denied; and failure to so appear constitutes a default.

SWEENEY, *Assistant Secretary*:

Peter Steinberger appealed from decision of November 4, 1915, allowing Ruby McLaughlin, as successful contestant, to apply to exercise her preference right to enter W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10, T. 34 N., R. 9 E., M. M., Havre, Montana, on the ground that her contest apparently caused relinquishment of the former entry.

June 19, 1915, Steinberger made homestead entry for above land, against which McLaughlin, February 12, 1915, filed contest, charging:

that said entry is not made in good faith, but for speculative purposes only; that the said entry is being held for the benefit and in behalf of one Andy Poier,

of Rudyard, Montana, for the purpose of selling the relinquishment thereto at a high figure; that said entry has been offered for sale at various times by said Poier and the entryman himself.

Service was made, denial filed, and hearing set to be held before the local office August 13, 1915. April 10, 1915, contestant filed application for a continuance supported by affidavit that:

on account of the absence of two of her witnesses from the State she will not be able to offer testimony sufficient to warrant the cancellation of the entry, if the hearing be had on April 13, 1915, and that these witnesses will not return to the vicinity of the land involved until after June 1, 1915. That for precautionary reasons of her own she does not, at this time, wish to disclose the names of these witnesses.

The local office record shows that relinquishment of the entry was filed April 13, and at the same time the contest was dismissed for default of contestant in appearing at the trial then to be held. She appealed to the Commissioner, who held:

Whether the denial of the motion for continuance was made on April 10 or April 14 the fact remains that there could not properly have been a dismissal of the contest for want of prosecution on April 10, nor could such action have been taken while the motion for continuance was pending unacted upon, and similarly, the contestant can not properly be charged with default in her failure to appear on April 13 at 10 a. m., while the motion for continuance remained undecided.

The Commissioner therefore reversed the action of the local office in dismissing the contest and directed that contestant be notified of the relinquishment and of her right to apply for the land, and, if she did so, notice should be given to the intervening applicant, Gertrude Draeger, who had filed application for the land at the same time as the relinquishment that she might apply for a hearing under regulations of April 1, 1913 (42 L. D., 71).

The motion for continuance was without any semblance of merit. The affidavit did not set out, in substance, the matter which the absent witnesses were expected to testify to; nor did it divulge the names of the witnesses; nor did it show that their absence was not due to collusion and consent of the contestant; nor did it show that the application for continuance was not made for the purpose of delay. These matters are strictly required by the regulations applicable in such cases. An affidavit for continuance should show what effort had been made by the movant to obtain attendance of such witnesses. *Smith v. Smart* (7 L. D., 63). An affidavit for continuance is not good which does not negative collusion and consent of the moving party to the witnesses' absence. *Bucklin v. McEachran* (16 L. D., 106, 108). The substance of the testimony expected to be adduced from the absent witnesses should be set out so that the adverse party may admit that such witnesses would so

testify and thus avoid expense and delay of a continuance. *Gray v. Dawkins* (20 L. D., 342).

The Department can not admit that a contestant can not properly be charged with default in failure to appear while a motion for continuance remains undecided. April 13, 1915, being the day for trial, it was the duty of both parties to be present, ready to proceed with the case in event the application for continuance was denied. To hold otherwise would permit a party at any time before trial to file a formal motion for continuance and then absent himself until served with notice of action upon the motion for continuance. Practically, a case could never be brought to trial, if the practice suggested by the Commissioner is affirmed. It follows therefore that default was properly charged against contestant, and the action was properly dismissed.

The decision is therefore reversed and, if no other objection appear, Draeger's application will be allowed.

McLAUGHLIN v. STEINBERGER.

Motion for rehearing of departmental decision of May 29, 1916, 45 L. D., 168, denied by First Assistant Secretary Jones July 15, 1916.

STATE OF CALIFORNIA ET AL.

Decided May 29, 1916.

OIL LANDS—APPLICATION FOR CLASSIFICATION—PRACTICE.

In performing the duty of passing upon the sufficiency of applications for classification of land as nonoil, the Commissioner of the General Land Office may submit such applications to the Geological Survey for consideration and report; and reports and recommendations made thereon by the Geological Survey, when adopted and acted upon by the Commissioner, are as fully his action as if he had himself examined and acted upon such applications without aid of the Geological Survey.

SWEENEY, Assistant Secretary:

The State of California, on behalf of F. W. Robinson, its transferee, appealed from decision of February 29, 1916, denying classification as nonoil of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, T. 28 S., R. 27 E., M. D. M., Visalia, California, on the ground that the proofs submitted do not show its nonoil character.

September 16, 1907, the State filed its selection for above land, which was included in petroleum reserve No. 18, by executive order of January 26, 1911. The State filed application for classification of

the land as nonoil, which was referred by the Commissioner to the Geological Survey, which reported February 8, 1916, that the evidence submitted by applicant had been carefully considered and information available to the bureau did not warrant classification of same as nonoil. The commissioner therefore denied the application.

The appeal insists that the Commissioner's decision is contrary to law in this:

that the Commissioner of the General Land Office failed, refused and neglected to consider and pass upon said application for classification but referred the same to the United States Geological Survey and said United States Geological Survey failed, refused and neglected to consider or pass upon said application for classification.

There is no provision of law whereby the Geological Survey is vested with any functions whatever in regard to the disposition of public lands or in regard to adjudicating the character thereof in connection with their disposition.

The objection here made, that the Commissioner of the General Land Office did not himself examine and pass upon the oil character of the land, has no merit.

In a case involving a similar principle, the *Hannibal Bridge Co. v. United States* (221 U. S., 206), an order had been made by the Assistant Secretary of War, acting for the Secretary. Objection was made that such officer had no authority. The court held:

It is true that that communication was signed by the Assistant Secretary of War, and not by the Secretary himself. And that fact is relied upon to invalidate the entire proceeding. There is no merit in this objection. The communication signed by the Assistant Secretary shows, upon its face, that it was from the War Department and from the Secretary of War, and that the Secretary, without abrogating his authority under the statute, only used the hand of the Assistant Secretary in order to give the owners of the bridge notice of what was required of them under the statute. It is physically impossible for the head of an executive department to sign, himself, every official communication that emanates from his department.

So, in the present case, it would be physically impossible for the Commissioner of the General Land Office or the Secretary of the Interior, who ultimately makes a designation of this character, to personally examine the land and personally pass upon its oil character. Should either of these officers undertake such work, it could never be accomplished. The Geological Survey is a bureau of the Interior Department, equipped with experts and facilities for determining questions of this kind, and it is entirely proper to make reference of such questions to that bureau, for its examination and advice. The Commissioner, being advised, properly refused to designate the land as nonoil.

The decision is affirmed.

DURWARD E. FRY.

Decided May 29, 1916.

DESERT LAND ENTRY—ANNUAL PROOF—EXTENSION OF TIME.

The provision of section 5 of the act of March 3, 1891, that a desert land entryman shall file during each year proof of the expenditure of one dollar per acre, is mandatory; and neither the Commissioner of the General Land Office nor the Secretary of the Interior has authority to extend the time within which to make such expenditure and furnish proof thereof.

SWEENEY, Assistant Secretary:

Durward E. Fry has appealed from a decision of the Commissioner of the General Land Office, of date January 26, 1916, denying extension of time for making yearly proof, the land involved being the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, T. 9 N., R. 33 E., B. M., 40 acres, Blackfoot, Idaho, land district.

December 15, 1913, expiration notice was duly issued and served. Entryman replied to it by letter, urging in substance that he could not work on the land on account of mountain fever, when the work there should have been done; that he had 130 posts ready for fencing, but gives no value of them, nor the value of any expenditure for labor, if any, upon them; he also stated that he would do the required work when the weather permitted. The record, including this letter, was duly transmitted to the General Land Office, where the Commissioner, by his decision of January 26, 1915, held the entry for cancellation, and directed the local office to allow claimant 30 days from the date of service of the notice, within which to furnish evidence of expenditures made on, or for the benefit of, the land, to meet the statutory requirement of expenditure of \$1.00 per acre, failing in which, and in default of appeal, the entry was to be canceled without further notice. This decision was duly served, on February 8, 1916, upon the claimant, who replied by letter of March 28, 1916, repeating, substantially, the circumstances urged in his former letter appealing to the Department.

Section 5 of the act of March 3, 1891 (26 Stat., 1095), provides:

Said party (entryman) shall file during each year, with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended * * * If any party who has made such application shall fail during any year to file such testimony as aforesaid the lands will revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled.

This language clearly shows its mandatory character; and it follows that neither the Commissioner nor the Department have any

supervisory discretionary jurisdiction to qualify the plain provisions of the statute in question.

The decision of the Commissioner is, therefore, affirmed.

OZMUN v. HEIRS OF SMITH.

Decided May 29, 1916.

HOMESTEAD APPLICATION—DEATH OF APPLICANT PRIOR TO ENTRY.

By the filing of a homestead application in all respects proper and complete the applicant acquires a right which upon his death prior to allowance of entry descends to his heirs; but no such right is acquired by the filing of an application incomplete because not accompanied by the requisite fee and commissions, as will descend to the heirs of the applicant in event of his death prior to payment of such fee and commissions.

SWEENEY, Assistant Secretary:

On June 7, 1904, Morgan Smith filed application to make second homestead entry for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 22, T. 144 N., R. 79 W., Bismarck, North Dakota, land district, and the application was allowed by the Commissioner of the General Land Office March 5, 1906. Smith was allowed 60 days within which to make entry for the land upon paying the requisite fee and commissions. He died before completing the entry and on July 3, 1906, one of his heirs paid the amount required and perfected the entry in the name of Morgan Smith.

A contest was filed against the entry by John H. Ozmun, December 8, 1911, alleging the death of the entryman and failure on the part of the heirs to reside upon or cultivate and improve the land. It was, however, stipulated by the parties to the controversy that the heirs had sufficiently cultivated the land from 1906 to 1912, inclusive, but the Commissioner held the entry for cancellation on the authority of the case of *Garvey v. Tuiska* (41 L. D., 510), wherein the Department held that there is no authority of law for the allowance of entry in the name of a deceased person and that the filing of an application created no interest or estate in the land and none descended to the heirs of the deceased applicant whose application was not allowed prior to his death. No appeal was taken from this action and Ozmun made homestead entry for the land March 6, 1914.

On July 22, 1915, Edith Smith Cleveland, one of the heirs of the deceased, filed application for reinstatement of the entry, relying upon the case of *Lotton v. Hobbie* (43 L. D., 229), which modified the decision in the *Garvey-Tuiska* case. From the decision of the Commissioner, of August 7, 1915, denying this application, an appeal has been taken.

The decision in the case of *Lotton v. Hobbie*, *supra*, and the other decisions of the Department holding that by the filing of an application to make homestead entry of land, properly subject thereto, the applicant acquires a right which upon his death prior to allowance of entry descends to his heirs, are based upon the proposition that an application in all respects proper and complete had been filed. Herein lies the distinction between these cases and the one now under consideration. Upon the filing of the application by Smith to make second homestead entry, it became the duty of the Department to determine his qualification to make the same. This was done, but he died before the payment of the requisite fee and commissions and the application was, therefore, incomplete. At no time prior to his death could the same have properly been allowed; he acquired no vested interest in the land and none did or could descend to his heirs.

The entry was properly canceled and the application for reinstatement must therefore be denied. The decision of the Commissioner is affirmed.

WILLIAM J. HARRIS.

Decided May 31, 1916.

PLACER MINING CLAIM—LEGAL SUBDIVISIONS.

The smallest legal subdivisions authorized by statute according to which placer claims on surveyed lands may be located and described are ten-acre tracts, normally in square form; but where location of a claim by ten-acre tracts in square form would necessitate the inclusion of lands which have passed out of the public domain or which are embraced in adjoining mining claims, the claim may be located and described by rectangular ten-acre tracts, as provided by paragraphs 22 to 24 of the regulations of July 1, 1901, even though not in square form.

JONES, *First Assistant Secretary*:

This is an appeal by William J. Harris, from a decision of the Commissioner of the General Land Office, dated January 21, 1916, holding for rejection his mineral application 04347, filed February 26, 1912, at Lewiston, Idaho, as to the Quartz Creek placer No. 26, embracing the E. $\frac{1}{2}$ W. $\frac{1}{2}$ E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 16, T. 37 N., R. 5 E., B. M. The application also embraced other lands not here in issue, the area applied for having been held to be mineral in character by the Department's decision of August 18, 1915, in the case of *State of Idaho v. William J. Harris*. The Quartz Creek placer No. 26 is stated to have been located in 1911.

The Commissioner held that the location must be made in square form, holding as follows:

While the earlier regulations permitted placer locations to be made in five-acre tracts, end to end, the regulations of nineteen hundred and nine, in effect when the Quartz Creek number twenty-six claim was located, omitted such provision, and the unit has since been held, by the Secretary, to be a ten-acre tract, in square form.

The record discloses that the land immediately to the west of this location is part of the grant made to the State of Idaho in aid of common schools, and that adjoining to the east is embraced in other mining locations. The appellant, therefore, contends that it is impossible for him to comply with the requirement of the Commissioner.

Section 2330, Revised Statutes, provides that legal subdivisions of forty-acre tracts may be subdivided into ten-acre tracts. Section 2331, provides as follows:

Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining-claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

The regulations of July 26, 1901 (31 L. D., 453, paragraphs 22 to 24, inclusive), permitted placer mining locations to be made in the same form as the Quartz Creek placer No. 26. The regulations of March 29, 1909, as reprinted November 6, 1912, however, omitted paragraph 23 of the preceding regulations, and provided in paragraph 24:

A ten-acre subdivision may be described, for instance if situated in the extreme northeast of the section as the "NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ " of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

In the case of Laughing Water Placer (34 L. D., 56), the Department, at page 58, held that a location rectangular in form and of dimensions corresponding to appropriate legal subdivisions, and with east and west and north and south boundary lines, was in conformity with the system of public-land surveys. In Roman Placer Mining Claim (34 L. D., 260), it was held that the smallest legal subdivision of the public surveys provided for by the mining laws, is a subdivision of ten acres in square form and such laws do not contemplate

that in the location and entry of placer mining claims rectangular tracts of five acres may be recognized and treated as legal subdivisions. It was stated at page 262:

In such cases, it is provided: (1) that a regular subdivision of forty acres may be *subdivided*, that is, reduced by subdivision, according to the system of public land surveys, to four tracts of ten acres each in square form, . . . The smallest legal subdivision provided for by the statute is a subdivision of ten acres; and that must be in square form, else it would not be a subdivision according to the system of the public-land surveys.

In *Snow Flake Fraction Placer* (37 L. D., 250), the Department held (paragraphs 2 and 6 of the syllabus):

A placer location, whether upon surveyed or unsurveyed lands, will not be required to conform to the public land surveys and the rectangular subdivisions of such surveys when such requirement would necessitate placing the lines thereof upon other prior located claims or when the claim is surrounded by prior locations.

Whether a placer location conforms sufficiently to the requirements with respect to form and compactness is a question of fact for determination by the land department in the light of the showing made in each particular case, keeping in mind that it is the policy of the government to have all entries, whether of agricultural or mineral lands, as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular and fantastically-shaped tracts.

At page 253, in quoting *Hogan and Idaho Placer Mining Claims* (34 L. D., 42), the suggestion was made that tracts as small as ten acres in area and square in form are recognized as legal subdivisions under the mining laws.

In *American Smelting and Refining Company* (39 L. D., 299), it was held, in determining the character of land embraced in a placer location, ten-acre tracts normally in square form are the units of investigation and determination. At page 301 it was stated:

The statute, mining regulations, and decisions clearly contemplate that a placer location may be made of a ten-acre tract in square form.

From the above resume of the regulations and decisions of this Department, it is apparent that formerly locations rectangular in form, such as the *Quartz Creek placer No. 26 claim*, were allowed. Since the decision in *Roman Placer Mining Claim*, *supra*, and the adoption of the regulations of March 29, 1909, however, ten-acre subdivisions must normally be in a square form. In the present case the record, however, discloses that it is impossible for the applicant to comply with this requirement for the reason that the adjoining lands which would necessarily have to be embraced in a location square in form, have either passed out of the public domain or are embraced in adjoining mining claims. The case, therefore, falls within the principle laid down in the second paragraph of the

syllabus in the Snow Flake Fraction placer, *supra*. It is unnecessary to require the applicant to have a survey and plat made as on unsurveyed land under section 2331, Revised Statutes, since the description used identifies the claim with accuracy and permits of its segregation from the adjoining lands. In cases such as is here presented, a compliance with paragraphs 22 to 24, of the regulations of July 26, 1901, *supra*, will be accepted by the Department.

The decision of the Commissioner is accordingly reversed and the application will be allowed in the absence of other objection.

INSTRUCTIONS.

February 1, 1916.

RAILROAD GRANT—ACTS OF MARCH 3, 1909, AND MAY 6, 1910.

Upon the purchase by a railway company of lands within an Indian reservation, under the acts of March 3, 1909, and May 6, 1910, for reservoirs, material, ballast, or the planting of trees, a patent should be issued to the company for such lands, with a provision that the grant is made solely for the purpose of the use of the land as specified in the company's application to purchase, and that in event of abandonment of such use the land shall revert to the United States or its grantee.

NOTATION UPON ENTRIES AND PATENTS.

Entries under the public land laws embracing lands applied for and patented to a railway company under said acts, and the patent issued thereon, should be noted as subject to the rights of the railway company under its application and patent, and similar notation should be made in the case of trust or fee patents upon Indian allotments embracing any such lands.

SWEENEY, *Assistant Secretary*:

I am in receipt of your [Commissioner of the General Land Office] letter of September 13, 1915 (358215 "F", F R D), requesting instructions as to the method of conveying lands to railway companies under the acts of March 3, 1909 (35 Stat., 781), and May 6, 1910 (36 Stat., 349).

The act of March 3, 1909, *supra*, provides in part as follows:

That when, in the judgment of the Secretary of the Interior, it is necessary for any railway company owning or operating a line of railway in any Indian reservation to acquire lands in such Indian reservation for reservoirs, material, or ballast pits for the construction, repair and maintenance of its railway, or for the purpose of planting and growing thereon trees to protect its line of railway, the said Secretary be, and he is hereby authorized to grant such lands to any such railway company under such terms and conditions and such rules and regulations as may be prescribed by the said Secretary.

That when any railway company desiring to secure the benefits of this provision shall file with the Secretary of the Interior an application describing the lands which it desires to purchase, and upon the payment of the price agreed upon the said Secretary shall cause such lands to be conveyed to the railway

company applying therefor upon such terms and conditions as he may deem proper: Provided, That no lands shall be acquired under the terms of this provision in greater quantities than forty acres for any one reservoir, and one hundred and sixty acres for any material or ballast pit, to the extent of not more than one reservoir and one material or gravel pit in any one section of ten miles of any such railway in any Indian reservation: And provided further, That the lands acquired for tree planting shall be taken only at such places along the line of the railway company applying therefor as in the judgment of the said Secretary may be necessary, and shall be taken in strips adjoining and parallel with the right of way of the railway company taking the same, and shall not exceed one hundred and fifty feet in width.

That all moneys paid for such lands shall be deposited in the Treasury of the United States to the credit of the tribe or tribes, and the moneys received by said Secretary as damages sustained by individual members of the Indian tribe, which damages shall be ascertained by the Secretary of the Interior and paid by the railway company taking such lands, shall be paid by said Secretary to the Indian or Indians sustaining such damages.

The act of May 6, 1910, *supra*, extends and makes applicable the act of March 3, 1909—

to any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation; that the damages and compensation to be paid to any Indian allottee shall be ascertained and fixed in such manner as the Secretary of the Interior may direct and shall be paid by the railway company to said Secretary; that the damages and compensation paid to the Secretary of the Interior by the railway company taking any such lands shall be paid by the said Secretary to the allottee sustaining such damages.

The particular case giving rise to the request is that of the Oregon Short Line Railroad Company, the successor in interest to the Utah & Northern Railway Company, as to the right of way granted across the Fort Hall Indian Reservation, Idaho, under the act of July 3, 1882 (22 Stat., 148). The railroad company there desired a narrow strip of land adjacent to its preexisting right of way. A map showing the location of this strip was filed, and the conveyance to the railroad company took the form of the following approval, noted upon that plat:

Approved as to restricted allotted Indian land involved, under the provisions of the act of March 3, 1909 (35 Stat. L., 781), as amended by the act of May 6, 1910 (36 Stat. L., 349), subject to any prior valid existing rights and adverse claims and subject also to the terms and conditions of three certain stipulations executed by the company on April 10, 1913.

The plat, itself, did not disclose, except by virtue of its reference to the two acts cited therein, that the land was desired for ballast purposes, but such purpose was plainly stated in the railroad company's application. You point out that this has been noted upon the tract books of the General Land Office as an ordinary right of way, and that other similar approvals have been made without any notation upon the records of the General Land Office.

The matter has been referred to the Commissioner of Indian Affairs, who, under date of November 2, 1915, made report, recommending that a patent for lands so desired by railroad companies should be issued through your office, providing that the proper conditions may be incorporated in such a patent; or, otherwise, that a conveyance in the nature of a deed be made.

The act of March 3, 1909, *supra*, it may be pointed out, authorized the Secretary of the Interior, whenever in his judgment it is necessary for a railway company to acquire lands in an Indian reservation for reservoirs, material or ballast pits, or for the planting of trees, to grant the lands to the railway company under such terms and conditions as he may prescribe. It requires the railway company to file an application describing the lands "which it desires to purchase," and upon payment of the price, the Secretary of the Interior—

shall cause such lands to be conveyed to the railway company applying therefor upon such terms and conditions as he may deem proper.

Ordinarily, where an act of Congress directs the Secretary of the Interior to transfer title to public lands, without specifically providing by what means the transfer shall be made, a patent therefor will be issued in the usual manner. (Instructions of June 3, 1902, 31 L. D., 348.) I am of the opinion that, similarly, a patent should be issued to the railway company for lands acquired under the acts of March 3, 1909, and May 6, 1910; such patents, however, to contain the condition that the grant is made solely for the purpose of the use of the land as specified in the company's application; and, that upon the abandonment of such use, the land shall revert to the United States, or its grantee. Entries under the public land laws, and patents issued thereon, should be noted as subject to the rights of the railway company under its application and patent; and similar notation should be made in the case of trust or fee patents upon Indian allotments.

Hereafter, upon approval by the Department of applications by railway companies under the acts of March 3, 1909, and May 6, 1910, the Commissioner of Indian Affairs will transmit such application to your office for the preparation and issuance of the proper form of patent, as herein directed. The Commissioner of Indian Affairs is also directed to transmit to your office all similar applications heretofore approved, in order that they may be properly noted upon your records, and the proper form of patent be issued.

The plat transmitted with your letter is herewith returned.

MARGRETT C. FIFIELD.*Decided June 1, 1916.***DESERT LAND ENTRY—WATER RIGHT.**

Mutual water companies, organized by the water users themselves, and not engaged in the sale of water or water rights, do not come within the act of the Idaho legislature of March 13, 1909, regulating and controlling the sale of water rights within that State; and a desert land entryman within that State, whose source of water supply is such a water company, will not be required to furnish the certificate of the State Engineer showing that such company is authorized to sell water.

JONES, *First Assistant Secretary*:

This is an appeal by Margrett C. Fifield from a decision of the Commissioner of the General Land Office dated April 26, 1915, holding for cancellation her desert land entry No. 06746, made October 6, 1909, at Blackfoot, Idaho, for the SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 31, T. 9 S., R. 31 E., B. M. Final proof was made August 9, 1913; final certificate issuing August 27, 1913.

As evidence of her water-right, the entrywoman submitted a certificate of stock, showing ownership of 8.035 shares in the Bench Ditch Irrigating Company. In a report made by a mineral inspector of the General Land Office, dated April 22, 1914, in accordance with paragraph 18 of the regulations of September 30, 1910 (39 L. D., 253), it appears that the Bench Ditch Irrigating Company is a mutual concern composed of water-users. It owns water under a decree of court, and also under a permit for additional water issued by the State Engineer of Idaho. The final proof discloses that there are about 40 acres in the entry capable of irrigation, and the Commissioner in the decision under appeal required the claimant to furnish evidence of the ownership of additional shares of stock to the amount of 4.298. Since the filing of the appeal, the entrywoman has submitted a certificate of the Bench Ditch Irrigating Company, dated July 6, 1915, certifying that "Margaret C. Fifield" is the owner of five shares of stock in that company. As to this feature, the case is remanded for the Commissioner's consideration of the supplemental evidence filed.

House Bill No. 276, being the act of March 13, 1909 (Idaho Session Laws 1909, page 335), requires that all persons, copartnerships or associations then owning or thereafter acquiring or constructing irrigation works, should, before selling any water right or right to use water, file with the State Engineer of the State of Idaho, a map showing the location of the works, etc., together with a petition for a certificate of authority to sell water rights in such works. If the showing is satisfactory, under section 3 of the act, a certificate is to be issued by the Chairman of the State Board of Land Commissioners,

certifying the number of acres which may be irrigated therefrom and the form of contract or deed which shall be given to the purchasers of water rights. Section 5 provides that any deed or contract conveying water rights prior to the filing of the above-mentioned certificate in the County Recorder's office, or in excess of the water rights or amount of water authorized to be sold, shall be null and void, making the owner of the irrigation works liable for any damage sustained by purchasers of water rights or interests through the failure of the owner to comply with the provisions of the act, and also subjecting the owner or his agents to criminal liability. The Commissioner in the decision under appeal held that the entrywoman must furnish evidence that the certificate required by section 3 of the Idaho act of March 13, 1909, has been issued to the Bench Ditch Irrigating Company.

In his report of April 22, 1914, the mineral inspector stated as follows:

The Bench Ditch Co., was organized in 1883 as a mutual association and incorporated in 1897. The stock had been fully subscribed for some years prior to the passage of the above act. Any transfers in stock subsequent to that act has been made by and between various stockholders, the part of the company being only to record such transfers on its books. I, therefore, do not consider that the Bench Ditch Irrigating Company is subject to the above act.

The Idaho act of March 13, 1909, is entitled, in part, as—

An act providing for the regulation and control of the sale of water rights. . . . and providing for the issuance of certificates by the State Board of Land Commissioners, showing the amount of water which the owners of such works are authorized to sell, and for the approval by the State Board of Land Commissioners of the deeds and contracts of sale used in the sale of water rights, and for the recording thereof.

The purpose of the act is undoubtedly to protect purchasers of water and water rights from companies engaged in the sale thereof. The present company is not of that character, but a mutual company organized by the water-users themselves. The only transfers subsequent to the act have been between the various stockholders, and the company appears not to have been engaged in the business of selling water or water rights. The Department accordingly concurs in the view of the mineral inspector that it is not subject to the Idaho act of March 13, 1909. In this respect the Commissioner's decision is reversed.

The matter is accordingly remanded for further proceedings in harmony herewith.

D. C. WEYAND.*Decided June 2, 1916.***PRACTICE—APPEAL—RULE 74.**

A decision by the Commissioner of the General Land Office respecting the right of the register of a local land office to make additional homestead entry, based upon the mere request of the register for an opinion as to his qualifications to make such entry, is not a final decision "relating to the disposal of public lands" within the meaning of Rule 74 of Practice, and no appeal will lie therefrom.

JONES, First Assistant Secretary:

On July 24, 1903, D. C. Weyand made original homestead entry for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 8, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 17, T. 4 N., R. 91 W., 6th P. M., Glenwood Springs, Colorado, land district, and on February 23, 1915, he assumed the office of register of the Glenwood Springs land office.

On July 14, 1915, Weyand requested the opinion of the Commissioner of the General Land Office as to his right to make additional homestead entry for lots 3 and 4, Sec. 8, SW. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 8, and NW. $\frac{1}{4}$ NE., Sec. 17, of said township, which land was withdrawn September 16, 1914, for resurvey.

On August 5, 1915, the Commissioner advised the applicant that in view of his official position he would not be allowed to make additional entry at this time, and from this opinion of the Commissioner the applicant has appealed.

It is stated in the appeal that—

Appellant does not seek to make entry at this time. Such a proceeding would be impossible because of the pending withdrawal for resurvey.

The so-called appeal cannot be considered as such under Rule 74 of the Rules of Practice (44 L. D., 408), which provides that—

An appeal may be taken to the Secretary from the final decision of the Commissioner in any proceeding relating to the disposal of the public lands and private claims.

The opinion of the Commissioner is not a final decision "relating to the disposal of public lands," and no appeal lies therefrom. See D. A. Clement (6 L. D., 772). The appeal is therefore dismissed.

HUGH A. KELSO, JR.*Decided June 6, 1916.***REPAYMENT—TIMBER AND STONE—FILING FEE.**

In the absence of any fraud or attempted fraud, an applicant under the timber and stone act, upon rejection of his application, is entitled under section 2 of the act of March 26, 1908, to repayment of the ten-dollar filing fee deposited by him in connection with his application.

JONES, *First Assistant Secretary*:

Your [Auditor for the Interior Department] letter of January 4, 1916, suggesting that the claim of Hugh A. Kelso, Jr., for return of filing fee of \$10, paid by him in connection with timber and stone application, Roseburg, Oregon, 09754, be rejected, has been received and duly noted.

On September 24, 1914, Kelso filed timber and stone sworn statement and application to purchase the NW. $\frac{1}{4}$, Sec. 17, T. 30 S., R. 13 W., Roseburg, Oregon, land district; and on September 29, 1914, deposited the required fee of \$10, which has been covered into the Treasury of the United States.

The appraiser reported that while there was some yellow fir on the land, there was no merchantable timber thereon; and, on his recommendation, the local officers, on May 25, 1915, rejected the application. On December 22, 1915, the Department approved the recommendation of the Commissioner of the General Land Office that Kelso's application for repayment of the filing fee paid by him be allowed, under the act of March 26, 1908 (35 Stat., 48), section 2 of which provides:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

The question raised by you, that repayment of the \$10 fee deposited by the applicant with his application to purchase land under the timber and stone law is not authorized by the above act, is not a new one, having heretofore been fully considered by this Department. Attention is directed to instructions of the Department to the Commissioner of the General Land Office of June 6, 1911 (40 L. D., 131), which are in part as follows:

The Department has, however, exacted that the fee shall be filed with the application, presumably as an evidence of good faith, and where the application is properly received and the failure to offer proof thereon is the fault of the claimant, it may fairly be held that the applicant thereby forfeits his right to the return of the fee. In such a case repayment should not be allowed, but where, for any reason other than the fault of the applicant, the application must be rejected, the fee is not earned and section 2 of the act of March 26, 1908 (35 Stat., 48), furnishes ample authority for its return.

The act of June 3, 1878 (20 Stat., 89), providing for the sale of land chiefly valuable for timber and stone, contains certain conditions which must be complied with by the applicant before he is permitted to make entry for the lands desired to be purchased. He must first file a sworn statement setting forth certain conditions in regard to the land, and notice thereof must be published, and proof of publication duly made. Satisfactory evidence must be furnished that the

land is of the character contemplated in the act, unoccupied and non-mineral—

and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver the applicant may be permitted to enter said tract.

The act does not require the payment of the fee at the time of filing the application, but, on the contrary, provides that the same shall be paid together with the purchase price of the land. By departmental regulations of January 2, 1914 (43 L. D., 37), issued pursuant to the terms of the act, to provide for the proper administration thereof, the fee must accompany the application, as an evidence of good faith on the part of the claimant. The same are part and parcel of the same transaction, and rejection of the application, where the applicant is not guilty of fraud, or attempted fraud, is equivalent to a rejection of the fee as well, and the same is not earned unless the application is allowed. If, for any reason, the fee should not be paid at the time the application is filed, payment thereof, upon rejection of the application, could no more be required than payment of the purchase price of the property, or compliance with the other requirements of the statute.

There is no reason why a different procedure should be followed with reference to fees tendered with applications to make timber and stone entries, than with reference to fees accompanying homestead applications. In the latter cases, fees are not covered into the Treasury until the application is allowed; and, if rejected, are returned as unearned.

It is the opinion of the Department that the applicant herein, not being guilty of any fraud, or attempted fraud, is entitled to repayment of the fee paid by him; and that section 2 of the act of March 26, 1908, *supra*, furnishes ample authority for the allowance of the present application.

ALVIN R. JONES ET AL

Decided June 7, 1916.

SCHOOL INDEMNITY SELECTION—SETTLEMENT.

A mere settlement upon public land is not such an appropriation as will prevent school indemnity selection thereof; and where the settler subsequently abandons his claim, the pending school indemnity selection attaches.

TIMBER AND STONE DECLARATORY STATEMENT—SETTLEMENT.

No rights are acquired by the filing of a timber and stone declaratory statement for land at that time inhabited by a *bona fide* settler, notwithstanding the settler may thereafter abandon the land.

JONES, *First Assistant Secretary*:

Alvin R. Jones has filed motion for rehearing of the Department's decision herein of November 10, 1913, rejecting his second homestead

application filed May 13, 1908, for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 24, T. 34 S., R. 5 W., Roseburg, Oregon, land district, alleging settlement February 11, 1908, the township plat having been filed in the local office April 14, 1908, and allowing application of the State of Oregon to select the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and the timber and stone application of Louis Kohlhausen to purchase the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, of said section filed April 14, 1908.

In the consideration of this case on appeal from the decision of the Commissioner of the General Land Office, the Department found that the homestead claimant did not reside on the land from February, 1909, to December, 1911, but wholly abandoned the same during this time, and, as stated in its decision, it is well established that one claiming a preference right to public land by virtue of prior settlement must continue to reside upon the tract pending the determination of his claim as against a prior applicant or entryman, and it is not sufficient that residence be maintained only to the date of filing application to enter. *Pounder v. Allen* (39 L. D., 348); *Shaw v. Russell* (38 L. D., 275); *Mary E. Coffin* (34 L. D., 298); *McInnes et al. v. Cotter* (21 L. D., 97). It follows that in view of Jones's abandonment of the land he can not continue to assert his preference right thereto, and he will not be heard to say that the land was not subject to selection by the State. The remaining question presented by the motion is whether the State's selection and the timber and stone application, both of which were filed on the date the township plat was filed in the local office, are valid in view of Jones's settlement on the land at that time.

Under section 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), States may select "unappropriated" lands as indemnity for school land losses. Mere settlement on public lands does not amount to an appropriation thereof, but only confers a preference right thereto which is lost unless followed up by appropriate entry. *D. A. Cameron* (37 L. D., 450), and *Thompson et al. v. Craver* (25 L. D., 279). During such time the land is subject to selection, in the absence of other objection, or even to settlement, subject to the right of entry being awarded the first settler pursuant to his preference right, provided he continues to comply with the law.

The decisions of the Supreme Court of the United States in the case of *St. Paul, Minn. & Man. Ry. Co. v. Donohue* (210 U. S., 21), and of this Department in the cases of *Frank et al. v. Northern Pacific Ry. Co.* (37 L. D., 193, 502), and *De Long v. Clarke* (41 L. D., 278), wherein it was held that the selections were invalid because the land embraced therein was in the actual occupancy of *bona fide* settlers, although the settlers subsequently abandoned their claims to the land, are based upon entirely different statutes from the one

now under consideration. In the case first mentioned, the indemnity privilege of the railway company was limited by the act of August 5, 1892 (27 Stat., 390), to land to which at the time of selection "no right or claim had attached or been initiated" in favor of another. In the Frank cases the right of selection was limited by act of March 2, 1899 (30 Stat., 993), to agricultural land "not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection." The De Long case involved a forest lieu selection which under the act of June 4, 1897 (30 Stat., 36), could only be made of "vacant land open to settlement."

In the cases of *State of California v. Turner* (26 L. D., 669), and *Thomas J. Creel* (30 L. D., 244), involving State school indemnity selections of land covered by valid settlement claims, wherein it was held that the lands were not subject to such selections, it will be observed that the settlers made homestead entries for the respective tracts claimed by them and the important element of abandonment involved herein was not present in those cases. By the doctrine of relation the rights of a settler upon making entry attach as of the date of settlement, cutting off all intervening claimants, but if entry is not perfected the settlement claim does not defeat a subsequent State school indemnity selection.

In the case of *State of Washington v. Mack* (39 L. D., 390), the State's school indemnity selection of land embraced within a homestead entry based upon settlement prior to survey was upheld, the entry being relinquished while the selection was still pending.

The timber and stone application of *Kohlhagen* was filed under the act of June 3, 1878 (20 Stat., 89), which provides that nothing therein contained "shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler" on the lands sought to be purchased, and further provides for the filing of a written statement designating the land, which statement shall set forth the fact that the land is "uninhabited." The Department has uniformly held that the timber and stone act does not allow the purchase of land that is inhabited by a *bona fide* settler at the time of the filing of such declaratory statement. *Martin v. Henderson* (2 L. D., 172); *Hughes v. Tipton* (2 L. D., 334); *Manners Construction Company v. Rees* (31 L. D., 408). Such settlement defeats the timber and stone application although the settler may thereafter abandon the land. *St. Paul, Minn. & Man. Ry. Co. v. Donohue*, *supra*; *Frank v. Northern Pacific Ry. Co.*, *supra*; *De Long v. Clarke*, *supra*. *Kohlhagen's* timber and stone application was, therefore, defeated by *Jones's* settlement on the land covered thereby.

The decision of the Department in so far as it allows the application of the State is adhered to but is recalled and vacated as to the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and Jones's homestead application therefor will be allowed and Kohlhaugen's timber and stone application rejected.

MARY J. LANE.

Decided June 9, 1916.

DESERT LAND ENTRY—ACT OF MARCH 4, 1915.

Section 5 of the act of March 4, 1915, providing for the relief of desert land entrymen, is applicable only to lawful desert land entries made prior to July 1, 1914, and pending at the date of the act; and has no application to an entry canceled prior to the act, for failure to make the necessary proof, and which had not been reinstated.

JONES, *First Assistant Secretary*:

Mary J. Lane has appealed from decision of December 13, 1915, by the Commissioner of the General Land Office, denying her application for relief under the remedial act of March 4, 1915 (38 Stat., 1161).

The appellant made desert land entry May 25, 1910, for lot 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, T. 1 N., R. 10 E., Rapid City, South Dakota, land district, upon which she submitted first yearly proof on June 2, 1911, showing expenditures of \$288. Failing to make the second yearly proof within the time required by law, her entry was canceled on April 10, 1913.

March 15, 1915, she submitted second yearly proof showing expenditures of \$340; she also filed application for reinstatement of the entry, and the Commissioner reinstated her entry on April 26, 1915.

The claimant submitted third yearly proof on June 17, 1915, showing expenditures of \$250; and, on October 30, 1915, she filed application for relief under the second and third paragraphs of section 5 of the said act of March 4, 1915.

The Commissioner denied the application, as above stated, for the reason that the entry was not a lawful, pending entry at the date of the approval of the said act.

The act is applicable only to lawful desert land entries made prior to July 1, 1914, and which were pending on the date of the act, and concerning which the requirements of the law as to yearly expenditures and proof have been complied with.

In this case, the entry was not in existence at the date of the act, as it was canceled nearly two years prior thereto, for failure to make the necessary proof, and it had not been reinstated. Clearly, the act was not intended to afford relief in such cases. It is specifically

limited to entries "pending" at the date of the enactment. The conditions named in the act are not present in the case under consideration. See instructions of April 13, 1915 (44 L. D., 56).

The decision appealed from is affirmed.

MARCIA BROOKFIELD.

Decided June 17, 1916.

DESERT LAND APPLICATION—UNSURVEYED LAND.

In view of the provisions of the act of March 28, 1908, the land department is without authority to receive, entertain, suspend, or allow an application to make desert land entry for unsurveyed land.

SWEENEY, Assistant Secretary:

Marcia Brookfield appealed from decision of February 3, 1916, rejecting her desert land application for SE. $\frac{1}{4}$, Sec. 31, T. 14 S., R. 18 E., S. B. M., Los Angeles, California, on the ground that the land is unsurveyed.

August 3, 1915, Brookfield filed her desert land application which the local office then rejected and the Commissioner affirmed that action. The plats of survey of the General Land Office show that the northeast portion of the township has been surveyed and the south and northwest part of the township have never been surveyed, and the surveyor's returns showed that those parts of the township were barren sand hills.

The appeal asserts that the land is reasonably level, capable of irrigation from the Colorado River, and lies 100 feet above sea level, and is desirable agricultural land susceptible of irrigation. Such facts, if true, do not affect the case. The act of March 28, 1908 (35 Stat., 52), provides that after date of that act desert land entries shall be restricted to surveyed land, with the provision—

That any individual qualified to make entry of desert land under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

The land department has no authority to receive, entertain, suspend or allow a desert land application for unsurveyed land. All that can be obtained by improvement of desert land is the preference right of entry promised in the act.

The decision rejecting the application is, therefore, affirmed.

HENRY McFARLAND ET AL.

Decided June 20, 1916.

FEES AND COMMISSIONS—SECOND HOMESTEAD ENTRY.

The laws and regulations relating to the payment of fees and commissions in connection with original homestead entries apply with equal force to second homestead entries; and an application to make second homestead entry, not accompanied by the requisite fee and commissions, is not a complete application and does not segregate the land.

JONES, *First Assistant Secretary:*

Henry McFarland has appealed from the decision of the Commissioner of the General Land Office of February 21, 1916, holding for cancellation as to the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 22, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, T. 7 S., R. 18 E., N. M. P. M., Roswell, New Mexico, land district, his second homestead entry made September 9, 1915, under the act of September 5, 1914 (38 Stat., 712), for this and other land not involved herein, for conflict with the homestead entry of William A. Roberts, made July 10, 1914.

On January 15, 1914, McFarland filed application to make second homestead entry for said land, which was submitted to the General Land Office for consideration and on June 24, 1915, the same was allowed.

On July 10, 1914, the record being clear, William A. Roberts made homestead entry for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 22, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, of said township, and thereafter established residence on said land and placed improvements on the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, alleged by him to be worth \$1,400.

McFarland's application was not accompanied by the fee and commissions required by law and was not, therefore, a complete application and did not segregate the land applied for. The laws and regulations relating to the payment of fees and commissions in connection with original homestead entries apply with equal force to second homestead entries, and applications to make second entries should in like manner be accompanied by such fees and commissions. *John H. Ozmun v. Heirs of Morgan Smith*, D-31139, decided May 29, 1916 (45 L. D., 173).

Attention is called to paragraph 7 of Circular No. 105, containing general instructions in regard to reports and accounts relating to the public lands, and strict compliance therewith should be required. Said paragraph is as follows:

Applications, declarations, etc., which are not accompanied by the money required by law or regulations to be tendered at the same time they are filed will be assigned current serial numbers. You should note such applications, etc., on the "Serial Number Register," hereinafter referred to, rejecting them for the reason that they are not accompanied by the money required by law

or regulations. Checks or drafts are, of course, to be treated as no money, and should be returned with your notice of rejection, stating that they are not receivable by you under the law and regulations, and that cash or currency or United States Post Office money orders be tendered, as directed in paragraph 69 hereof. On such rejection, the applicant, of course, has the right of appeal within 30 days, under the "Rules of Practice", merely against your rejection of the application, however, for the reason that no money was received therewith, unless, of course, there are additional causes for rejection at the time the application is received by you. You will not in such cases, pending the receipt of the money, segregate the land, as the law and regulations are specific in that the money must be tendered with the application, and if it is not transmitted the applicant acquires no rights under the application until the money is tendered. If the applicant should transmit the money, and the land has not in the meantime been segregated, the application should retain the same serial number as was given it at the time of filing, and action thereon may be taken in accordance with the regulations. A new application need not be filed, but it must be plainly noted in the upper left-hand corner of the application that it was received without the money, and that the money was subsequently tendered. The exact time and date of the tender of the money should also be noted on the application. In the Remarks column of the general "Schedule of Serial Numbers," required under paragraph 42, opposite report of the serial number of the application, you must note "no money". However, if the money is tendered before the returns for the month in which the application is filed are transmitted, the notation "no money" need not be made on the general schedule, but the number of the receipt which issued for the money will be noted in the Receipt Number column of said schedule.

The decision of the Commissioner is affirmed.

CLARA BELLE RUHL.

Decided June 20, 1916.

RESIDENCE—SCHOOL TEACHERS.

There is no special rule applicable to school teachers respecting the residence required upon a homestead entry, the statute operating on all settlers alike, regardless of their occupations.

JONES, *First Assistant Secretary.*

Clara Belle Ruhl filed motion for rehearing of departmental decision of April 10, 1916, rejecting her three-year final proof on her homestead entry for E. $\frac{1}{2}$, Sec. 17, T. 19 S., R. 65 W., 6th P. M., Pueblo, Colorado, for insufficient residence.

August 24, 1911, Ruhl made homestead entry on which she submitted final proof September 2, 1915. The local office rejected it for insufficient residence, and the Commissioner and Department affirmed that action. It appears from the proof that she established residence July 7, 1912, maintaining it until September 7, that year. She returned to her claim May 1, 1913, remaining until December 25 following. She was on her claim June, July, August, and September,

1914. In 1915, she was there June, July, and August, to the date of final proof.

The three-year homestead law requires actual residence seven months in each year of the life of an entry. This is the condition that Congress has imposed and was granted by Congress as a concession to the hardship of the former homestead law which required residence for five years.

Claimant's appeal states that she has no other domicile, and that she has done her utmost to fulfill the conditions of the law. In a former letter to the Department, she states that she has resided on the land far above the vacation residence of teachers and within a month or two of the twenty-one months from other settlers.

There is no special rule for teachers. The rule of the statute operating on all teachers and settlers alike, the Department has no authority to dispense with it. The motion therefore, shows no cause to vacate, recall or modify the former decision, which is adhered to, and the motion is denied.

ALLEN v. FULLER.

Decided June 20, 1916.

INSANE ENTRYMAN—APPOINTMENT OF GUARDIAN.

As long as a proceeding of guardianship remains in force in a court having jurisdiction of such matters, the appointment of a guardian is conclusive upon the land department, and an adjudication that a man is of infirm mind, disqualified to conduct his own affairs, so that the appointment of a guardian is necessary for his protection, closes the question against any inquiry by the land department.

JONES, *First Assistant Secretary:*

Katheryn M. Allen appealed from decision of January 25, 1916, dismissing desert land entry amended to embrace SW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 22, R. 13 S., R. 12 E., S. B. M., Los Angeles, California, on the ground that claimant is entitled to extension of time for effecting reclamation.

October 17, 1907, Fuller made entry for unsurveyed land, which was adjusted to the land first above described. He filed first, second and third annual proofs showing expenditure in the aggregate of \$875. January 13, 1912, he applied for and was allowed an extension of time to October 17, 1914, in which to make final proof. November 19, 1914, Allen filed contest against the entry alleging that no final proof had been made, that claimant had not acquired water right, had not cultivated one-eighth of the land, and had constructed no system of irrigation ditches. Notice was issued, served, and answer filed asking a hearing.

January 13, 1915, Fuller filed application for further extension of time of three years in which to make his final proof. Hearing was begun in the local office February 9, 1915, both parties appearing, aided by counsel, and submitted evidence. March 18, of that year, counsel for Fuller filed proof that proceedings in guardianship had been instituted in the Superior Court of Imperial County, California, for appointment of a guardian to George M. Fuller the claimant, as a person incompetent to manage his own affairs. Later there was filed the appointment of Raymond H. Satterwhite as guardian for said Fuller, appointed by said court May 17, 1915. Further evidence was taken in the matter, and the local office, June 4, 1915, found for defendant, recommending that he be allowed further extension of time to complete reclamation of the land. The Commissioner reviewing the record found that claimant had cleared 120 acres of the land and graded some of it at an expense not more definitely stated than that it was between \$2 and \$25 per acre; that he had further sunk a large number of wells at a cost of \$4,000, obtaining only a domestic supply in fifteen of them, the remainder being dry holes.

The Commissioner held that claimant had in good faith attempted reclamation and was entitled to a further extension of time, which was granted to him to October 17, 1917, and dismissed the contest.

There are twelve assignments of error. The first aims at the appointment of a guardian. The Department will not enter into a discussion of the propriety of appointing a guardian. The appointment was made by the court having exclusive jurisdiction of the subject-matter and can not be collaterally inquired into. It was held in *Sarah J. Campbell* (16 L. D., 177) that:

It was shown by the certificate of the court, which of course imports verity, that Irene Lambert was the duly appointed guardian of the entryman's minor child. Hence neither the validity of such appointment nor the acts of the guardian thereunder are matters that can be assailed collaterally in a proceeding before the Department.

As long as a proceeding of guardianship remains in force in a court having jurisdiction of such matters, the appointment of a guardian is conclusive upon the Department, and the adjudication that a man is of infirm mind, disqualified to conduct his own affairs, so that an appointment of guardian is necessary for his protection, closes the question against any inquiry of the land department.

The status of the entryman being thus established as an insane person he is entitled to all the protection which the law permits to be extended to a man in that unfortunate condition. It is clear that his entry was made and prosecuted in good faith. He has expended more than \$4,000. It is not a question whether these expenditures have all been as wisely made as might be. They were made for the

purpose of effecting reclamation. It appears that the entryman has resided on the land since March, 1908, making it his home.

The pendency of a contest does not prevent allowance of an application for an extension of time to effect reclamation. *Phillips v. Gray* (41 L. D., 603), *Hoobler v. Treffry* (39 L. D., 557).

It is argued that Fuller has not obtained from the Imperial Valley Water Company No. 8 water rights for this land. All delays which have occurred in the development of the Imperial water system are well understood in the Department. It is known that unusual conditions exist there and that claimants acting in the utmost good faith have been unable to acquire water rights. The acts for extension of time or for other relief for such claimants are equitable in character and relief ought to be extended by the Secretary under these acts in every case where good faith of the applicant is apparent. In the present case the application is the more forcibly addressed to the equitable powers of the land department because of the unfortunate claimant's mental condition. No reason appears why he is not entitled to the benefit of the act of March 4, 1915 (38 Stat., 1161). The action of the Commissioner granting him an extension is affirmed and the contest dismissed.

TROTT v. NORTHERN PACIFIC RY. CO.

Decided June 22, 1916.

NORTHERN PACIFIC SELECTION—GROS VENTRE LANDS—HOMESTEAD APPLICATION.

Where indemnity selection lists by the Northern Pacific Railway Company for lands within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian reservation, restored to the public domain and opened to certain classes of entries by the act of May 1, 1888, were rejected on the ground that such lands were not subject to selection by the company as indemnity, and during the pendency of an appeal by the company from such action the act of March 3, 1911, was passed, declaring such lands a part of the public domain and "open to the operation of laws regulating the entry, sale, or disposal of the same," and the company thereafter, pursuant to instructions of September 30, 1913, from the General Land Office, filed supplemental lists for the lands theretofore selected, tendering the necessary fees and receiving receipt therefor, the rights of the company thereunder are superior to any rights acquired by settlement or the filing of a homestead application subsequent to the date of receipt of the instructions of September 30, 1913, by the local officers, although prior to the filing of the supplemental lists.

JONES, *First Assistant Secretary*:

The Department has considered the motion filed in the above-entitled case by Lucile J. Trott for rehearing of departmental decision of November 5, 1915 [not reported], affirming the decision of the Commissioner of the General Land Office rendered May 29, 1915, rejecting her homestead application 024230, filed December 13, 1913,

under the act of February 19, 1909 (35 Stat., 639), for the S. $\frac{1}{2}$, Sec. 27, T. 25 N., R. 55 E., M. M., Glasgow, Montana, land district, on the ground of conflict with Northern Pacific railway indemnity selection list No. 8 (Glasgow 04815).

It appears that the tract applied for by Trott December 13, 1913, is within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Indian Reservations, restored to the public domain and opened to certain classes of entries by the act of May 1, 1888 (25 Stat., 113, 133). Plat of survey was filed in the local land office May 3, 1909, and the township designated under the act of February 19, 1909, *supra*, on May 1, 1909. The land is included in coal reserve, Montana, No. 1, created by Executive order of July 9, 1910.

The described tract lies within the second indemnity limits of the grant to the Northern Pacific Railway Company, and on May 3, 1909, the company applied to select the same with other lands per list No. 8 (Glasgow 04815).

The local officers, following the rule laid down in the case of *Bradley v. Northern Pacific Railway Company* (37 L. D., 410), that the act of May 1, 1888, *supra*, did not authorize appropriation of land thereunder by railway selection, rejected the selection involved, subject to the right of appeal, and the receiver, in accordance with the regulations then governing (37 L. D., 51, paragraph 29), returned the fees by his official check on the same day they were received. From such rejection the railway company appealed to the Commissioner of the General Land Office.

By departmental instructions of March 21, 1910, prior to final action by the Commissioner on the then pending appeal of the railway company, the Commissioner was directed to suspend further action on the appeal pending final decision by the courts in a case wherein the same issue was present.

While action on the railway selection was thus suspended, Congress passed the act of March 3, 1911 (36 Stat., 1080), which provides as follows:

That section three of the act of May first, eighteen hundred and eighty-eight, ratifying and confirming an agreement with the various tribes or bands of Indians residing upon the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservations, in Montana Territory, be, and the same is hereby, amended so as to read as follows:

"SEC. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of laws regulating the entry, sale, or disposal of the same: *Provided*, That no patent shall be denied to entries heretofore made in good faith under any of the laws regulating entry, sale, or disposal of public lands, if said entries are in other respects regular and the laws relating thereto have been complied with."

September 30, 1913, the primary objection to the allowance of the pending railway selection having been removed by the passage of said act, the Commissioner returned the list to the local officers with direction that the same be allowed—

as to such tracts embraced in the same as your records, upon receipt hereof, show to be free from other claims, subject to such further examination as may be found proper by this office.

You will require the Railway Company to file separate lists for the clear tracts, and for those for which other claims have been asserted, should the company desire to prosecute its claim to the latter. If the company files the lists indicated, they should be numbered List No. 8 Supplemental "A" and Supplemental "B" and should be given the old serial No. 04815.

Pursuant to these instructions supplemental lists "A" and "B" were prepared and filed, and on December 19, 1913, the railway company tendered the necessary fees and on said date the receiver issued his official receipt therefor.

The facts and status of the tract applied for, in the case at bar, are similar in all essential respects to those involved in the case of Guss Hagenstein (Glasgow 029133), wherein the Department rendered decision under date of March 30, 1916 (45 L. D., 17), denying motion for rehearing, with the exception that in the present case Trott filed her homestead application on December 13, 1913, prior to the date the Northern Pacific Railway Company filed supplemental lists "A" and "B" in connection with the conflicting railway selection No. 8 (Glasgow 04815).

It therefore devolves upon the Department in the instant case to determine what rights, if any, appellant acquired superior to those of the railway company by virtue of alleged settlement upon the land, or by the filing of a homestead application, subsequent to date of receipt of the Commissioner's letter of September 30, 1913, directing the allowance of said list as to the tracts then found not to be in conflict, and prior to the filing of the supplemental lists by the railway company December 19, 1913.

In the first place it should be here stated the Department entertains no doubt that the act of March 3, 1911, quoted, authorizes the selection of these lands in satisfaction of a railway indemnity grant if they are of the character subject to such selection. Therefore, after the passage of said act the duty of making appropriate disposition of the pending selection devolved upon the land department.

In the case of Reichert *v.* Northern Pacific Railway Company (44 L. D., 78), it was held that the act of March 3, 1911, *supra*, did not validate railway selections filed prior to the date of the passage of said act which were rejected by the local officers when presented; that a railway selection filed prior thereto similar to the one under consideration, and so rejected, did not constitute an entry within the

meaning and intent of the proviso to the act of March 3, 1911, but that such selection did segregate the land from other disposition and was properly considered as a valid selection for land to which no rights or claim had attached prior to the date, the said instructions from the Commissioner, to take action on the selection under the act of March 3, 1911, were received at the district land office.

The selection, in so far as the tracts free from adverse claim were concerned, was, in fact, treated, and properly so, in the nature of a new selection, effective and pending from and after the date of receipt of the Commissioner's letter by the local officers, but not prior thereto.

It devolved upon the Department, as hereinbefore stated, to dispose of said lists under the law then in force and the action taken by the Commissioner was to relieve from suspension the railway selection. The land at the date the Commissioner took that action, being subject to appropriation by the railway company and the railway company having at all times prior thereto manifested its desire and intent to select the same, it would have been a useless and burdensome requirement to compel the railway company to file new selection papers, practically a duplication of the selection then before the Department. The original selection could have been and was allowed as to the tracts free from adverse claim, as above stated, irrespective of the supplemental lists. The supplemental lists were in nowise a prerequisite of the taking of appropriate action on the original selection under the act of March 3, 1911, *supra*.

It is, therefore, held that movant, not being a party in interest at the date of receipt of the Commissioner's letter of September 30, 1913, by the local officers, will not be heard to question the Department's authority to relieve from suspension the pending railway selection, the disposition of which appears regular and in accordance with law.

It is asserted on behalf of claimant that he has acquired equities in the premises, as a settler, by virtue of having placed improvements on the tract applied for. Trott received actual notice that her homestead application was rejected by the local officers and if she subsequently placed improvements on the land she did so without authority of law and in no way impaired any prior legal claim of the company under its selection.

The record does not in any manner warrant the finding that the railway selection was not filed in good faith. The fact that it was filed a few months after rendition of the Bradley decision, hereinbefore cited, does not, directly or indirectly, warrant such a holding. The regular filing of an application, of any class, for specific tracts of land, even though adverse action on the application must

necessarily be taken, under the decisions in force and effect at the time the application is filed, does not impute bad faith.

The briefs filed on behalf of this and other claimants having analogous cases pending before the Department, have received painstaking consideration and the Department in determining Trott's rights has, in addition thereto, exhaustively considered the contentions presented orally herein by counsel.

Following the principle laid down in the Reichert case, cited, which is adhered to, the Department is convinced that Trott acquired no right superior to that of the railway company by settlement, or the filing of her homestead application, subsequent to the date of receipt of the Commissioner's letter of September 30, 1913, by the local officers.

The motion for rehearing is accordingly denied.

WILLIAM R. PERKINS.

Decided June 22, 1916.

ENLARGED HOMESTEAD—DESIGNATION—CHARACTER OF LAND.

It is incumbent upon an applicant to make entry under the enlarged homestead act to show that the land applied for is of the character subject to entry under that act, notwithstanding the land has been designated by the Government as of such character.

ENLARGED HOMESTEAD—TIMBER LAND.

The fact that land contains timber suitable for ordinary agricultural uses, but not of sufficient merchantable value to justify a timber entry of the land, will not prevent entry thereof under the provisions of the enlarged homestead act, where the land is otherwise of the class subject to such entry.

JONES, *First Assistant Secretary*:

By decision of April 18, 1916, the Commissioner of the General Land Office rejected the application of William R. Perkins to make additional entry under the enlarged homestead act, for the N. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, T. 39 N., R. 33 E., W. M., Spokane, Washington, land district.

It appears that Perkins made original homestead entry for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said Sec. 27, and his present application is for an additional entry under the enlarged homestead act. He stated in his application that the tracts in his original entry contained about 75,000 feet of fir and tamarac timber, but there is no timber on the land now applied for.

It appears that the tracts contained in the original entry and also the land now applied for have been designated as subject to entry under the enlarged homestead law. The Commissioner held, however, that it was incumbent upon the applicant to show that the lands

are of the character properly subject to entry under said law, notwithstanding the designation. The law provides for the designation of lands coming within the description contained in the law as of the character subject to entry thereunder, but it also imposes upon an applicant the burden of showing that the land sought to be entered is of the character prescribed by law. For the most part designations by the Department are made in large bodies, and such designation does not inalterably determine the character of the respective individual tracts. Therefore, should it be determined, in connection with an application to make entry, that the land is not actually of the character described in the act, such application should not be allowed.

After the decision of the Commissioner, rejecting the application, the applicant transmitted a communication wherein he stated that the Forest Service is selling timber much better and more favorably located than the timber in question, for \$1 per thousand feet, and that owing to the location the timber on the land involved has little value except to himself for use on the place. The Commissioner has treated the communication as an informal appeal and transmitted the record to the Department for consideration, especially in view of the uncertainty as to where the line ought to be drawn in such cases where some timber of inconsiderable value exists upon lands applied for under the enlarged homestead act. He has called special attention to one case wherein application was allowed, although the land contained 3,000 feet of timber.

The act of February 19, 1909 (35 Stat., 639), and acts amendatory thereof and supplemental thereto, provide for allowance of homestead entries for 320 acres or less "of nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber." Section 3 provides for additional entry contiguous to land embraced in an original entry to the aggregate area of 320 acres.

It would appear that the land embraced in the original entry in this case could not properly be considered as commercially valuable on account of its timber, as there are only 75,000 feet upon 160 acres, and that most suitable for domestic use. A small amount of timber useful in connection with an agricultural claim is desirable for home use and should not preclude allowance of an enlarged entry where the timber does not constitute an important commercial feature of the land. Interpretation of one public land law may be aided by consideration of other public land laws. While no general provision has been made for classification of the public lands, Congress has enacted various laws providing different methods of acquiring title to lands of different character. The act of June 3, 1878 (20 Stat., 89), provides for the sale of lands chiefly valuable for timber, at not less than \$2.50 per acre. This throws some light upon the purpose

and intent of the enlarged homestead law in the use of the term "merchantable timber." It would be unreasonable to hold that a single tree upon a tract is sufficient to take such tract out of the class of lands subject to entry under the provisions of the enlarged homestead law, if the land be otherwise subject to such entry. Unless the timber has merchantable value sufficient to justify a timber entry of the land, there is no impropriety of allowing entry under the enlarged homestead law provided the other conditions mentioned in the law obtain.

Therefore, in my opinion, the timber on the land involved is not of commercial value within the true meaning and intent of the act, and the application should be allowed if otherwise proper.

The decision appealed from is accordingly reversed.

ANDREW PRESTEBAK.

Decided June 23, 1916.

MINNESOTA DRAINAGE LAW—TAX SALE—PURCHASER.

A homesteader who fails to pay the drainage tax under the act of May 20, 1908, and whose land is bought in by the State for the delinquent tax, does not by purchase of the tax certificate from the State become entitled to purchase the land for cash, and thus evade his obligation to reside upon the land under his homestead entry; but his purchase of the tax certificate constitutes merely a redemption of the tax sale, and he will be required to continue compliance with the requirements of the homestead law.

JONES, First Assistant Secretary:

Andrew Prestebak appealed from decision of March 14, 1916, denying his application, under act of September 5, 1914 (38 Stat., 712), to purchase the SE. $\frac{1}{4}$, Sec. 23, T. 155 N., R. 37 W., 5th P. M., Crookston, Minnesota, land district, on the ground that at the time of his application he was holding said ground under a homestead entry, and his payment of the drainage tax was a satisfaction of it, and not a purchase from the State of the tax certificate.

December 6, 1911, Prestebak made homestead entry. He failed to pay the drainage tax levied by the State under act of May 20, 1908 (35 Stat., 169), and the State bought the delinquent tax. The State assigned the certificate to Prestebak October 21, 1914. October 27, of that year, Prestebak relinquished the homestead entry and applied to purchase the land as assignee of the State's right, under tax purchase. The Commissioner held that the payment of the money by Prestebak for the certificate satisfied the State for any delinquent tax due on the land; and, as he was required to pay that tax by the terms of his original entry, the purchase of the certificate was merely a payment of his obligation, and denied his application to purchase.

The appeal argues that the State has no longer any interest, and there is no reason to deny the application to purchase.

It is not a question of duty due to the State, or the right of the State, but the question of whether the homestead entryman may avoid obligation to live on the land he has entered, by becoming a purchaser of the tax lien from the State. The act of May 20, 1908 (35 Stat., 169), does not provide for purchase from the State by one having a homestead. Section three of that act provides that all charges legally assessed may be enforced against any unentered land. That is, they may be enforced against public lands of the United States. Section five, provides that—

at any time after any sale of unentered lands has been made in the manner and for the purposes mentioned in this act patent shall issue to the purchaser thereof upon payment to the receiver of the minimum price of one dollar and twenty-five cents per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions charged in entry of like lands under the homestead laws. But purchasers at a sale of unentered lands shall have the qualification of homestead entrymen and not more than one hundred and sixty acres of such lands shall be sold to any one purchaser under the provisions of this act. This limitation shall not apply to sales to the State but shall apply to purchases from the State of unentered lands bid in for the State.

As to entered lands which were not patented—the case of Prestebak—section 6 provides that entered lands not patented may be sold for taxes, and the purchaser of unentered lands may, within ninety days, redeem from such sale; but, if he fails to do so, the purchaser of the tax claim may buy the land from the United States and receive a patent. There is no provision that the holder of the entry may buy the tax lien and then evade his obligation to reside on the land under the homestead law, by making a purchase for cash. The only privilege given to an entryman of unpatented lands is that “the entryman shall be given the same rights of preemption as are given to the owners of lands held in private ownership.” The only right that an owner has as to the lands patented, is to redeem from the tax sale. It must, therefore, be held that the purchase of tax certificate from the State was merely a redemption of the tax sale.

The decision is affirmed.

LUCY M. DAY.

Decided June 24, 1916.

DESERT LAND ENTRY—ACT OF MARCH 4, 1915.

A desert land application presented prior to and pending at the date of the act of March 4, 1915, based upon rights initiated prior to July 1, 1914, and which should have been allowed when presented, and will, when allowed, relate back to the initiation of the claim, is within the spirit of the remedial provisions of section 5 of said act, and the applicant is entitled to avail himself of the relief accorded thereby.

JONES, *First Assistant Secretary*:

Lucy M. Day has appealed from the decision of the Commissioner of the General Land Office, rendered December 2, 1915, rejecting desert land application 019546, for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 31, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 32, T. 1 S., R. 40 E., B. M., Blackfoot, Idaho, land district; and also rejecting her application for relief, under act of March 4, 1915 (38 Stat., 1162), upon the grounds that the available water supply is insufficient to reclaim the land, and that the last two paragraphs of section five of said act of March 4, 1915, under which relief is sought, apply only in cases involving *lawful pending entries initiated prior to July 1, 1914*, and not in the case of a mere application to enter filed since that date.

Upon the facts disclosed by the record, the Department is of opinion that Day's application should have been allowed, when presented, in January, 1915; and, therefore, that her entry must be considered as pending at the date of the passage of the act of March 4, 1915, *supra*. Since her rights under her entry were initiated long prior to July 1, 1914, and said entry, when allowed, will relate back to the initiation of her claim to the land, it is held that she comes within the spirit of the remedial act.

The record is, accordingly, remanded for action in accordance herewith.

The decision appealed from is reversed.

HORACE G. WEESE.

Decided June 26, 1916.

CONTESTS AGAINST STATE SELECTIONS.

There is no statute authorizing contests against State selections, and it is not the policy of the land department to permit such contests, especially where the matters alleged in the contest affidavit are matters of record in the land department.

JONES, *First Assistant Secretary*:

Horace G. Weese, appealed from decision of the Commissioner of March 4, 1916, rejecting his contest affidavit against State indemnity school selection for Sec. 23, T. 22 N., R. 11 E., M. M., Great Falls, Montana, land district, in lieu of unsurveyed Sec. 36, T. 9 N., R. 6 E., M. M., within a national forest, on the ground that the contest of State indemnity selections is not permitted.

May 19, 1910, the State of Montana made its selection, against which Weese, July 24, 1915, filed contest affidavit, alleging that the base was unsurveyed land in a forest reserve, and therefore invalid to support the indemnity selection. The local office and the Commissioner rejected the application. The appeal insists that this ac-

tion was erroneous, and that contestant should have been allowed opportunity to prove, at a hearing, the allegations contained in his contest.

The selection is still pending, undisposed of. All the matters alleged in the contest affidavit are matters of record in the land department. The act of May 14, 1880 (21 Stat., 140), makes no express grant of right to contest State selections. In consideration of the respect due a sovereign State of the Union, it is not the practice of the land department to permit contest of State selections. There is no need of the aid of an informer in these cases, and the courtesy due the State forbids that contest should be permitted.

The decision of the Commissioner is affirmed.

HORACE G. WEESE.

Motion for rehearing of departmental decision of June 26, 1916, 45 L. D., 201, denied by First Assistant Secretary Jones August 18, 1916.

HIRAM E. WHEELER.

Decided June 28, 1916.

ENLARGED HOMESTEAD—ADDITIONAL—ACT OF MARCH 3, 1915.

Additional entry under the act of March 3, 1915, may be made only where the land in the original entry, as well as that in the additional application, has been designated as subject to entry under the enlarged homestead act; and where part of the original entry is susceptible of irrigation at a reasonable cost, and the land embraced therein is therefore not susceptible of designation, there is no basis for additional entry under the act of March 3, 1915.

JONES, *First Assistant Secretary*:

This is an appeal by Hiram E. Wheeler from a decision of the Commissioner of the General Land Office, dated March 18, 1916, declining to designate, under the act of March 4, 1915 (38 Stat., 1162), the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 34, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 25 N., R. 69 W., 6th P. M., Cheyenne, Wyoming, land district.

March 24, 1887, Wheeler made homestead entry No. 1612 at Cheyenne, Wyoming, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 35, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 26, of the above township. He made final proof thereon December 27, 1893, stating that he had cultivated and raised crops on 5 acres for six seasons; and had cut hay from 65 acres for six seasons. One of the improvements stated in this proof was an irrigating ditch. Final certificate was issued December 30, 1893, and patent, October 6, 1894. July 3, 1915, Wheeler filed his application 013705 for the tract first

described above, as an additional entry under the enlarged homestead laws, together with his petition for the designation of the entire area under the act of March 4, 1915, *supra*. In his application he alleged that there were not more than 60 acres upon the entire area which are susceptible of irrigation, at a reasonable cost, from any known source of water supply; that this acreage is entirely upon his original homestead, there being no land whatever susceptible of irrigation upon the land embraced in his additional application. This petition was referred to the Director of the U. S. Geological Survey, who, upon February 23, 1916, reported to the Commissioner as follows:

According to data available in the Survey the applicant's original homestead is crossed by Laramie River and is at least in part susceptible of irrigation. These data are confirmed by the description of the land under discussion submitted by the applicant, wherein it is set forth that not more than 60 acres in the original homestead is susceptible of irrigation.

Under the foregoing circumstances the original homestead is not subject to designation, and since its designation is necessary before any benefit can be derived from the provisions of the enlarged homestead act consideration of the advisability of designating the proposed additional entry is not required in making disposition of this case. Accordingly, the applicant's statements as to the character of the land in his proposed additional entry have not been taken up for consideration.

The present appeal was also referred to the Director of the Geological Survey, under the regulations of April 11, 1916; and, under date of May 25, 1916, the Director reports that no allegations have been made by the appellant to cause the Geological Survey to modify its prior conclusions.

The act of March 4, 1915, *supra*, permits—

any person qualified to make entry under the provisions of the act of February nineteenth, nineteen hundred and nine, and acts amendatory thereof and supplementary thereto—

to make applications to enter, under the provisions of said acts, any unappropriated public land which has not been designated as subject to entry under the enlarged homestead laws.

Section 3 of the act of March 3, 1915 (38 Stat., 956), provides:

That any person who has made, or shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his first entry, which shall not, together with the original entry, exceed three hundred and twenty acres: *Provided, That the land originally entered and that covered by the additional entry shall have first been designated as subject to this act, as provided by section one thereof.*

The act of March 4, 1915, therefore, permits of the filing of applications and requests for designation solely by such persons who are qualified to make entry under the enlarged homestead laws. Wheeler desires to make entry of the tract as additional to his original entry,

and under section 3 of the act of March 3, 1915, *supra*, it is necessary that both the land in the original entry and that covered by the additional entry shall have first been designated as subject to the enlarged homestead laws. The report of the Director of the Geological Survey, and Wheeler's own final proof, show that the original entry is, at least in part, subject to irrigation at a reasonable cost. Since the land embraced in his original entry can not be designated under the enlarged homestead laws, it follows that Wheeler could not make an additional entry.

The conclusion of the Director of the Geological Survey, and the decision of the Commissioner, are accordingly correct, and their action is hereby affirmed.

OPENING OF FORT BERTHOLD INDIAN LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, July 1, 1916.

REGISTER AND RECEIVER,

Minot, North Dakota.

SIRS: Under the President's proclamation of September 17, 1915 (44 L. D., 452), all lands in the former Fort Berthold Indian Reservation, classified as coal lands, not previously disposed of, were made subject to settlement and entry on June 1, 1916, at 9 o'clock A. M.

I am now in receipt of a communication from Mr. John McPhaul, Superintendent of Opening, from which it appears that on June 1, 1916, at 9 o'clock A. M., two hundred persons had assembled at the door of your office and the corridor leading thereto, under the supposition that their position in the line would determine their right of entry, but on his suggestion, you had publicly announced that all applications for such lands, tendered by those in attendance, would be considered as filed at the same time.

The superintendent is of the opinion that under the law, the regulations as contained in circular No. 324, and good administrative practice, those who made simultaneous entries at 9 o'clock A. M., standard time, should be given precedence over those who claim settlement on or after that hour. With this view I am in accord.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved July 1, 1916:

ANDRIEUS A. JONES,
First Assistant Secretary.

SWAN v. BERNARD.*Decided July 6, 1916.***CONTEST—RULE 2—QUALIFICATION TO ENTER.**

Under Rule 2 of Practice a contestant must be qualified to make entry, under the law specified by him, at the time of filing his affidavit of contest; and one who is disqualified to make homestead entry by reason of being the proprietor of more than 160 acres of land, is not qualified under Rule 2 to initiate a contest with a view to making homestead entry; and where so disqualified at the date of filing affidavit, the fact that such disqualification is subsequently removed does not have the effect to validate the contest.

CONTEST—ABANDONMENT—MILITARY SERVICE.

Where a homestead entryman who had declared his intention to become a citizen, but had not yet completed his citizenship, was, while visiting his native country, impressed into the military service thereof, his absence due to such cause, which is beyond his control, will not be considered an abandonment of his homestead entry.

JONES, *First Assistant Secretary:*

April 21, 1916, the Department granted petition for certiorari and directed the Commissioner of the General Land Office to transmit the record in the above-entitled case for departmental consideration. In accordance with that order the record was transmitted and has been considered.

It appears that on November 5, 1910, Joseph B. Bernard made homestead entry for the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 32, T. 35 N., R. 40 E., Elko, Nevada, land district. At the time he made entry he filed a copy of his declaration to become a citizen of the United States, but he has not completed citizenship.

August 28, 1914, Ernest M. Swan filed contest affidavit against said entry, charging that:

The entryman has abandoned said land and has not lived or resided, nor made his home upon said land for the past six months and ten days next immediately preceding the filing of this contest; that said entryman Joseph B. Bernard left Golconda, Nevada, on the 15th day of February, 1914, for the Republic of France, and has not been on said land nor resided thereon nor any part thereof since said date and that said entryman has not been upon said land nor any part thereof since the 15th day of February, 1914.

Notice was issued and proof of service by publication was filed. The entryman made no answer, but John C. Moore filed answer, as guardian of the estate of the entryman, showing that he was appointed as guardian under date of September 30, 1914, by the Judge of the District Court of the 6th Judicial District of the State of Nevada, in and for Humboldt County, upon the finding by the court after due hearing that the entryman was incompetent. Objection was made by the contestant against the appearance in the case upon the part of the guardian, it being alleged that the court had no authority to appoint the guardian for the entryman who was not at

that time within the jurisdiction of the court. The record of the proceedings pertaining to the citizenship was introduced at the hearing on the contest, but was objected to by the contestant. The local officers found from the testimony that the entryman had abandoned the land and recommended cancellation of the entry. Appeal was made by the guardian, but the Commissioner by decision of January 19, 1916, affirmed the action of the local officers and held that the guardian was without legal authority in the case, and he therefore directed that the entry be canceled and the case closed. Later, however, the Commissioner directed that action be suspended, and so far as shown the entry remains intact.

Appeal was filed by the guardian from the action of the Commissioner, but it was held that the guardian had no right to appear in the case for any purpose whatever, and the appeal was dismissed, but action was suspended for twenty days to allow opportunity to file petition for certiorari. The petition was thereupon filed as above stated.

In view of the action to be taken herein it will not be necessary to consider the legal effect of the guardianship proceedings. At the time Swan filed his contest he stated in his affidavit that he was not the owner of more than 160 acres and was qualified to make homestead entry, and intended to make homestead entry in the exercise of his preference right. His testimony given at the hearing shows that he was at that time living upon a ranch containing 880 acres, and that he had a contract for purchase of that land; that a deed of conveyance to him was then held in a bank to be delivered to him upon his making full payment of the purchase price; that he had made part payment; that the deed in escrow would convey to him the entire interest in the said 880 acres in case he makes full payment; that the purchase was made on February 3, 1914.

The purchase above referred to disqualifies Swan from making homestead entry. See Jacob J. Rehart (35 L. D., 615), and cases there cited. Neither was he qualified as a contestant with a view to making homestead entry in the exercise of his preference right. See Rule 2 of the Rules of Practice. On June 26, 1916, an affidavit executed by Swan on May 26, 1916, was filed with the Department, which states that the contract of purchase referred to was forfeited on February 3, 1916, because the affiant was unable to meet the payment which became due on that date, and that he now has no interest in said contract. This affidavit can not be introduced in evidence at this time nor in the manner stated. It is no part of the contest record. Furthermore, even if considered as proper evidence in the case, the qualification comes too late. He was not qualified as a contestant to make a homestead entry at the time of the filing of the contest or at the date of the hearing. Therefore, the action with reference to

the entry under contest is a matter solely between the entryman and the Government.

It is shown by the record that the entryman left the land in February, 1914, and went to France to visit his parents, and that he was engaged in attention to them until the outbreak of the present European War; that France is his native country, he having declared his intention to become a citizen of the United States, but not having completed citizenship he was impressed into the military service. A number of letters written by him after reaching France were introduced in evidence, and under the circumstances of the case it is believed that they are entitled to consideration. They indicate that he was anxious to return to this country, but that at first he was engaged in caring for his mother who was old and feeble, and afterwards was compelled to remain in the army, and that because of the belief that he would not be able to come back within the six months' period to protect his entry, he endeavored to dispose of it and executed a relinquishment which he forwarded to the father-in-law of the contestant in whom he appears to have had full confidence. He expressed strong feeling against his uncle, Adrian Bernard, because of the guardianship proceedings and other matters. The relinquishment was not filed apparently because the said uncle had possession of the land and it was thought inadvisable to file it. Both sides to this controversy claimed to be acting in the interest of the entryman. The contestant states that he proposes to pay the entryman \$1,000 in accordance with their agreement, less, however, the cost of the contest which was made necessary by the interference of Adrian Bernard. He contends that he is trying to keep the said uncle from beating the entryman out of the land. On the other hand, the uncle, the real party interested in the defense of the case, says that the contestant is trying to get the place for nothing, and that the defense is trying to protect the entryman's interest. It has been held that absence from a homestead entry for cause beyond the control of the entryman, as for instance judicial restraint, is not abandonment. See *Reedhead v. Hauenstine* (15 L. D., 554), and cases there cited.

In view of the circumstances disclosed the Department will permit the entry to remain intact and the contest is hereby dismissed.

The decision of the Commissioner is accordingly reversed.

SWAN v. BERNARD.

Motion for rehearing of departmental decision of July 6, 1916, 45 L. D., 205, denied by First Assistant Secretary Vogelsang September 13, 1916.

ENLARGED HOMESTEAD—ADDITIONAL ENTRIES—ACT JULY 3, 1916.**CIRCULAR.**

[No. 486.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 8, 1916.

REGISTERS AND RECEIVERS,

United States Land Offices, Arizona, California, Colorado, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

SIRS: The act of July 3, 1916 (Public, No. 142), added a seventh section to the enlarged homestead act, to permit an additional entry for land not contiguous to the tract originally entered—after submission of proof on the original entry. It reads as follows:

That the act entitled "An act to provide for an enlarged homestead," approved February 19, 1909, be amended by adding thereto an additional section to be known as section 7:

SEC. 7. That any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character herein described, and who shall have submitted final proof thereon, shall have the right to enter public lands subject to the provisions of this act, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: *Provided*, That the land originally entered and that covered by the additional entry shall first have been designated as subject to this act, as provided by section one thereof: *Provided further*, That in no case shall patent issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry: *And provided further*, That this section shall not be construed as affecting any rights as to location of soldiers' additional homesteads under section twenty-three hundred and six of the Revised Statutes.

2. This act has no application unless the first entry was made in one of the States where the enlarged homestead act is in force, as listed above, and the additional entry can not be allowed until both tracts shall have been designated thereunder. However, in considering allowance of the entry it is not material whether the applicant owns or occupies the original tract. A person whose two incon-
tiguous entries do not make up 320 acres, who has submitted proof on the first and occupies his unperfected second claim, may amend the latter by adding land contiguous thereto, so as to aggregate that area, subject to the requirements of this act respecting residence and

cultivation. Also the benefits of this act may be claimed by a person who has made and perfected more than one homestead entry, but the aggregate area of the land thus acquired with that applied for is limited to 320 acres.

3. The only qualifications required of an applicant under this act are that he has not already made an additional entry thereunder, and that the tract applied for will not, with other lands which he has entered and acquired title to under any of the nonmineral public-land laws, or which he is then claiming thereunder, make an aggregate of more than 480 acres.

4. It is not necessary that any of the land be designated under the enlarged homestead act when the application for additional entry is filed. The applicant must state that both tracts have been so designated, or he must file petition for designation of the undesignated land, as provided by the act of March 4, 1915 (38 Stat., 1162), and separate petitions must be filed for the different tracts if both be undesignated. These will be forwarded by the local officers, as directed by the regulations under said act.

Where an original tract, outside of the land district, is said to have been designated you will at once make inquiry of the proper office. If the response be satisfactory, action will be taken accordingly; but, if part or all of the original tract appears not to have been designated, the applicant will be allowed 30 days within which to file a petition for its designation.

5. On the notice of allowance of an application, and on the application itself, you will stamp, "This additional entry is within 20 miles of the original," or that it is not, as the fact may be. To ascertain whether two tracts are within 20 miles of each other, the shortest distance in a straight line between the nearest points will be considered as controlling.

6. There must be shown in proof on the entry the usual residence and cultivation and the existence of a habitable house upon the land entered, exception to these rules being made only where said tract is within 20 miles of that embraced in the original entry and the entryman is residing on the latter. In that event the homesteader need not reside on the additional entry nor have a habitable house thereon, if he owns and resides upon the original tract when applying for said entry, and continues both ownership and residence until submission of proof.

In the proof, to be submitted within five years after the date of the additional entry, there must be shown residence on the additional tract—or on the original, if permitted under the 20-mile exception above explained—for not less than three years, subject to the privilege of being absent five months in each year, as provided by the

three-year homestead act; also cultivation of not less than one-sixteenth of the additional tract during the second year after the date of the entry and of not less than one-eighth of its area during the third year and until submission of proof. Credit for military service will be allowed as in other cases.

7. As in other cases, a petition for designation, filed in connection with an entry under this act, must consist of an affidavit—executed in duplicate by the applicant and at least two witnesses—setting forth a description by legal subdivisions of all the land involved, its character, and the conditions governing the irrigability of both tracts.

If any part or parts thereof are irrigated, their location, area, source of water supply, and other pertinent facts should be stated. If any part or parts thereof are under constructed or proposed irrigation ditches or canals, or adjacent thereto, the relation of the lands to same and the reasons for applicant's belief that the lands are not irrigable therefrom should be explained. The relation of the tract to surface streams or springs rising on or flowing across them or in their vicinity should be indicated. If such sources of water supply are inadequate for the irrigation of the applicant's lands, or are not available to him, full particulars should be given. The location and depth of wells, elevation of water plane relative to the surface, and other pertinent facts which will disclose the quantity and quality of the water supply, obtainable from either ordinary or artesian wells on the land, should be given. If there are no wells thereon such information should be furnished as to any other wells in that vicinity, and the possibility of irrigating the tract involved from underground sources should be fully discussed. If any attempts have been made to irrigate and reclaim the tract, or if it has been included in a desert-land entry, the reasons for lack of success should be stated. The petition should be supplemented by a map or diagram in cases where the facts may be advantageously presented thereby.

Where the Geological Survey advises this office that it is unable to classify the land, or some part thereof, as subject to designation, this office will, through the proper local land office, furnish the applicant with a copy of the Survey's report, and will allow him 30 days within which to file response. At the applicant's option he may either appeal from the findings to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the facts, accompanied by such evidence as is desired, tending to disprove the adverse conclusion reached by the Survey. Such appeal or response, if filed, will be forwarded by you to this office, whence it will be transmitted to the Geological Survey for further consideration. That bureau will consider the evidence submitted and, if it warrants such action, will recommend designation of the land; or

if its conclusion be still adverse, will transmit the record to the Secretary with report. The case will thereafter be considered as having the status of an appeal pending before the Secretary's office. In cases where the applicant fails to furnish a showing, or to appeal from the order of this office requiring him to furnish it within the 30 days limited, or where the Secretary refuses designation, final action will be taken and the case closed by this office on the basis of the designations which may have been theretofore made.

8. The act does not apply in any manner to the State of Idaho. Therefore entries can not be made thereunder in that State.

9. The provisions of this act do not apply to entries under section 6 of the enlarged homestead act.

Very respectfully,

CLAY TALLMAN, *Commissioner*.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

ROACH v. COE.

Decided July 10, 1916.

SETTLEMENT—ASSERTION OF RIGHT—ADVERSE APPLICATION.

The statute giving a right of entry as against a settler who does not assert his claim within three months after the filing of the township plat of survey applies only to subsequent *settlers*, and does not give a mere applicant, without settlement, any right as against an actual settler, notwithstanding the settler may have failed to assert his claim within the statutory period.

JONES, *First Assistant Secretary*:

Willie L. Coe appealed from decision of March 10, 1916, canceling his homestead entry as to the SW. $\frac{1}{4}$, Sec. 35, T. 12 S., R. 33 E., N. M. M., Roswell, New Mexico, on the ground of Luther R. Roach's prior right.

This township was designated under the enlarged homestead act, May 1, 1909, survey in the field was made in January, 1913, and plat filed in the local land office December 1, 1914. March 15, 1915, Coe filed second homestead application for the S. $\frac{1}{2}$, Sec. 35. March 17, 1915, Luther R. Roach filed enlarged homestead application for SW. $\frac{1}{4}$, Sec. 35, and other land, which the local office suspended because of Coe's pending application. May 12, 1915, Roach filed protest against allowance of Coe's application, alleging settlement April 1, 1909; establishment of residence, which he maintained to date of the protest; that he had cultivated 50 acres in 1909, 120 acres in 1910, 100 acres in 1911, 1912, 1913, 1914 and 1915; and his improvements consisted of a half dugout, two wells, 110 and 102 feet deep

respectively, wind mill, reservoir 40 x 60 feet, iron barn, frame barn, granary, two corrals, fencing of entire claim, except a small part in section 34 on which he had not adjusted the fence to the survey—all valued at \$1000; that Coe had actual knowledge of his improvements and had passed through his farm; that Coe had not established residence, made any settlement, or any improvement.

August 7, 1915, the Commissioner directed a hearing between the parties to determine their respective rights, which was had, both parties appearing in person, aided by counsel, and submitting evidence. October 23, 1915, the local office found in favor of Roach, which action the Commissioner affirmed.

The appeal insists that as more than three months had elapsed after the filing of the plat in the local office, Coe has a right to make entry, notwithstanding Roach's prior settlement. He does not deny that, prior to his own application, he knew of Roach's settlement, but as Roach had not made his filing in the local land office within three months after filing the plat, he claims priority.

The statute giving right of entry as against a settler who does not declare his right within three months from the filing of the plat is intended for the benefit of subsequent settlers and not to give a mere applicant power to deprive an actual settler of his settlement right, improvements and property. Coe made no settlement prior to Roach's application and, therefore, can not insist on the allowance of his own.

The decision is affirmed.

ROACH v. COE.

Motion for rehearing of departmental decision of July 10, 1916, 45 L. D., 211, denied by Assistant Secretary Sweeney August 23, 1916.

FRANK EYRAUD ET AL.

Decided July 10, 1916.

MINING CLAIM—CONVEYANCE OF STRIP FOR RAILROAD PURPOSES.

Where the locator of a mining claim conveys all his right, title and interest in a strip thereof to a railroad company, over which the line of road is constructed, the area so conveyed should be excluded from application for patent for the claim.

JONES, First Assistant Secretary:

This is an appeal by Frank Eyraud *et al.* from the decision of the Commissioner of the General Land Office of February 7, 1916, requiring them under penalty on default of suffering cancellation of Sacramento mineral entry 08664 for the Indian Hill and Stony Bar and the

Indian Hill extension placer claims, survey 5086, to file supplementary application for certain areas designated "Tract A" and "Tract B" expressly excepted and excluded from said entry and the application upon which the entry was allowed.

The Indian Hill and Stony Bar claim was located November 24, 1902, and the Indian Hill extension October 26, 1903, and are contiguous to each other. The entire area included within the out-boundaries of each of these claims as surveyed is given in the field notes as, respectively, 34.360 and 19.986 acres. The said "Tract A" containing 2.606 acres, bisects a spur of the Indian Hill and Stony Bar claim and said "Tract B," containing 4.650 acres, bisects the main body of the Indian Hill extension. Both of these tracts, which are disconnected, lie along and 100 feet on each side of the center of the line of the Western Pacific railway, which crosses the claims in an easterly and westerly direction. With said tracts excluded the ground in question consists of 3 noncontiguous areas containing, respectively, about 35, 8 and 4 acres, the larger lying to the south and the two smaller to the north of the railway. The smaller areas are about 1000 feet apart.

Said tracts "A" and "B" are shown by the record to represent areas which by two separate deeds, dated May 10, 1907, were by the claimants of said mining locations "granted, bargained, sold and conveyed" to the Western Pacific Railway Company, the grantees reserving to themselves only the right to construct across said areas pipe lines for mining purposes.

Application for patent to the mining claims was filed by appellants August 18, 1915. Said application expressly excepted and excluded therefrom these tracts. Notice of the application having been posted for the required period at a point on the ground situated to the south of the railway and publication for the same period having been had, entry as applied for was allowed November 8, 1915. Upon considering the entry the Commissioner in the decision here appealed from, after calling attention to certain curable defects, said:

Exclusion is made in the application for patent of an area of 7.256 acres designated by the official survey as tracts "A" and "B." There is no record in this office of any patent having issued for this excluded area. The abstract of title shows that the locations included this area and that these claimants and their grantors on May 10, 1907, conveyed to the Western Pacific Railroad the land designated as tracts "A" and "B." The fact that the land embraced in a mining claim is used or occupied as a railroad right of way or has even been patented as a right of way does not authorize its exclusion from an application for patent for the claim. All persons entering public lands to part of which a right of way has attached, take the same subject to such right of way and the area of the right of way is to be computed as a part of the area of the tract entered. See *John W. Wehn* (32 L. D., 33); *Grand Canyon Railway Company v. Cameron* (35 L. D., 495, 497). The claimants are, therefore, required to file a supplementary application for patent for said excluded area, to publish and

post notice thereof, and upon the completion of the publication and posting, make an additional payment of \$17.50, making a total payment of \$137.50, the legal price for the total area of 54.346 acres embraced in the location, in order that patent may issue for the entire area in the absence of other objections. See Schirm-Carey and other lodes (37 L. D., 371), and Pocatello Gold, etc., Co. (42 L. D., 550).

The decisions cited by the Commissioner to sustain his ruling relate solely to tracts traversed by statutory rights of way attaching prior to any other appropriation thereof. The area included in the mining claims here in question, does not appear to occupy any such status. Said claims, as above stated, were located, respectively, in 1902 and 1903. The Western Pacific Railway Company, whose line of road is projected across the areas included in the location, are shown by the records of the General Land Office to have constructed its road under the provisions of the act of March 3, 1875 (18 Stat., 482), the map of definite location of which was filed in the General Land Office April 10, 1908. The fact as shown by the recitals in the deeds hereinabove referred to, that \$2,000 was paid the mineral claimants in consideration of the conveyances of tracts "A" and "B," would seem to indicate that the priority of right to the land was in the mineral claimants, or, in other words, that the said mining locations antedated any claim of any character on the part of the railway company to any portion of the areas included in the locations. This being true it must be held that the said decisions cited by the Commissioner have no bearing upon this case.

The precise present status of the tracts conveyed to the railway company and excluded from the mining claimants' application and entry is unnecessary to be here determined. Suffice it to say that the mineral claimants contend, and their contention finds ample support in the terms of the deeds above referred to, that they conveyed to the railway company not a mere easement in said tracts but their entire right, title and interest therein, reserving only the right to run pipe line across the areas for mining purposes. In view of these circumstances, they can not, on the present state of the record, comply as to said tracts "A" and "B" with the requirements of paragraph 42 of the mining regulations, which reads in part as follows:

Outside of the Territory of Alaska, the application for patent will be received and filed if the abstract is brought down to a day reasonably near the date of the presentation of the application and shows *full title in the applicant*, who must as soon as practicable thereafter file a supplemental abstract brought down so as to include the day of the filing of the application. Publication will not be ordered until the showing as to title is thus completed and the local land officers are satisfied that *full title was in the applicant on the day of the filing of the application*. (Italics borrowed.)

The Department is also of the opinion that in no event should the entry be canceled in its entirety for failure on the part of the min-

eral claimants to file supplementary application for said tracts "A" and "B." Mineral claimants are entitled to exclude any portion of the area included in a mining claim for any reason that may seem fit without affecting their right to some other portion of the area, provided the excluded portion does not contain an essential part of the improvements relied upon to support the application, or the discovery upon which the location is based.

For the reasons above stated the decision appealed from is reversed and the case remanded for appropriate action in harmony with the views herein expressed.

BLOOMSTRAND v. HEIRS OF LYON.

Decided July 10, 1916.

CONTEST—DECEASED ENTRYWOMAN—HEIRS.

Upon the death intestate of a homestead entrywoman, who made entry as a widow, leaving surviving a husband and children, the husband does not have the sole right of succession to the entry, but where under the statutes of the State the husband is an heir of his wife, the right of succession is to the heirs generally; and a contest against such entry must make both the husband and the children parties, meet the requirements of Rule 2 of Practice respecting the name, residence, and age of each heir, and notice thereof be served upon each of them.

JONES, *First Assistant Secretary:*

Samuel A. Bloomstrand appealed from decision of March 24, 1916, ruling him to amend his contest affidavit against homestead entry of Mary A. Dye, afterwards Lyon, deceased, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 20, T. 3 N., R. 3 E., B. M., Boise, Idaho, on the ground that he had not made all necessary parties in his contest.

October 29, 1913, Dye made entry and afterwards intermarried with one John H. Lyon. At the time she made entry she described herself as a widow and head of a family consisting of three sons. February 4, 1916, Bloomstrand filed in the local office an affidavit that claimant died about October 1, 1915, leaving a husband, John H. Lyon, and that during her lifetime she did not establish or maintain residence on the land; had no dwelling house thereon, and her said husband has not established or maintained residence on the land, which is wholly unimproved. Notice issued; was personally served on John H. Lyon February 5, 1916, who made no answer; and the local office forwarded the record to the Commissioner, recommending cancellation of the entry. The Commissioner called attention to Rule 2 of Practice, which requires that an applicant who contests must state the name and residence of each party adversely interested, including the age of each heir or any deceased entryman.

The Commissioner also found from the records of the entry that at the time of the entry Dye was the head of a family of three boys, and a widow, wherefore he directed the claimant to make the children of the deceased parties to the contest; to state their ages, and to serve them with notice, remanding the case to the local office.

The appeal asserts error in holding that where an entrywoman dies, leaving a husband, it is necessary to serve notice of contest on other persons than the husband.

In respect to a deceased homestead entryman, section 2291 of the Revised Statutes governs the succession. It provides:

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

It is noticeable that in case of a man making a homestead entry the succession devolves upon the widow; but in case of a widow making such entry it is her heirs or devisee who succeed. The statute makes the widow successor to the entryman in a homestead but does not make the surviving husband successor to a deceased entrywoman. It was held in *Heirs of May Lyon*, 40 L. D., 489, that where an entrywoman dies, leaving a husband and a minor child surviving, the child does not have the sole right of succession under section 2292, Revised Statutes, where the statutes of the State make the husband an heir of his wife. In Idaho, section 5702, volume 2, Idaho Revised Code, it is provided respecting the succession of a married woman:

1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. If the decedent leave a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation.

It is thus clear that Mrs. Lyon's husband is an heir to her estate as well as her three sons. There was, therefore, no error in the Commissioner's decision, which is affirmed.

ELLIOTT v. WHITE.*Decided July 10, 1916.***DESERT LAND ENTRY—EXPENDITURES—ACT OF MARCH 4, 1915.**

Where a desert land entryman after making the required expenditures, and being unable to reclaim the land, relinquished his entry and made second desert entry of the same land under the act of February 3, 1911, with the purpose of in good faith complying with the requirements of the desert land law, but made no additional expenditures under the second entry, he may receive credit for the expenditures made by him under his first entry for the purpose of availing himself of the remedial provisions of section 5 of the act of March 4, 1915.

DEPARTMENTAL DECISION DISTINGUISHED.

Herren v. Hicks, 41 L. D., 601, distinguished.

JONES, First Assistant Secretary:

Harry E. White has appealed from the decision of the Commissioner of the General Land Office of January 8, 1916, holding for cancellation his desert-land entry, made October 30, 1913, for the NW. $\frac{1}{4}$, Sec. 12, T. 9 N., R. 13 W., S. B. M., Los Angeles, California, land district.

First annual proof in support of this entry was filed October 10, 1914, alleging an expenditure of \$444.75, and on December 16, 1914, Harry W. Elliott filed affidavit of contest against the entry, charging fraud in making the same and failure to make any expenditures whatever looking to the improvement of the land since the date of the entry.

It appears that White made desert-land entry for this land February 6, 1908, which he relinquished October 30, 1913, after expending about \$4,246 in the improvement of the land and the construction of three wells in a fruitless effort to obtain water for irrigation purposes.

It is admitted that the expenditure alleged in connection with the present entry was the assumption and partial payment of an obligation incurred in connection with the former entry, and that there have been no actual expenditures made for the purpose of irrigating, reclaiming, or cultivating the land since the date of the present entry.

The Commissioner sustained the contest and held the entry for cancellation on the authority of the case of *Herren v. Hicks* (41 L. D., 601), wherein the Department held that from the date of that decision, March 6, 1913, "no expenditures except those made on account of the entry, can be credited on annual proofs, and expenditures once credited can not be again applied," and instructions of November 10, 1913 (42 L. D., 523), applying the rule announced in *Herren v. Hicks*, to cases where the land entered had been relinquished and a second entry made under the act of February 3, 1911 (36 Stat., 896).

Prior to the case of *Herren v. Hicks*, *supra*, it was held that an entryman under the desert-land laws who became the owner of improvements of a permanent character that added value to the land,

which were placed thereon by a former entryman, was entitled to credit for such improvements as if placed on the land by the entryman himself. See *Holcomb v. Scott* (33 L. D., 287); *Holcomb v. Williams* (33 L. D., 547); *Heflin v. Schnare* (40 L. D., 261).

Cases were frequently before the Department wherein parties were attempting to claim credit for improvements placed on land by former entrymen, where the latter had already received credit therefor, and the broad doctrine announced in the cases above mentioned was relied upon in many instances as an excuse for failure to make expenditures upon the latter entries, resulting in the perpetration of frauds upon the Government. It was to meet such a situation as this that the rule announced in the *Herren-Hicks* case was adopted.

This entryman had secured an extension of time within which to make final proof under his former entry, which expired November 1, 1913, and it appears that he relinquished that entry October 30, 1913, because the extension of time allowed him was about to expire, and he did not believe that he could reclaim the land within any period that might be granted by a further extension, and that his second entry was made to enable him to fully comply with the law, and not for the purpose of evading the same.

In view of the circumstances presented in this case, the same does not come within the spirit of the rule announced in the *Herren-Hicks* case, but it does come within the purview of the act of March 4, 1915 (38 Stat., 1161), which provides in part as follows:

That where it shall be made to appear to the satisfaction of the Secretary of the Interior, under rules and regulations to be prescribed by him, with reference to any lawful pending desert-land entry made prior to July first, nineteen hundred and fourteen, under which the entryman or his duly qualified assignee under an assignment made prior to the date of this act, has, in good faith, expended the sum of \$3 per acre in the attempt to effect reclamation of the land, that there is no reasonable prospect that, if the extension allowed by this act or any existing law were granted, he would be able to secure water sufficient to effect reclamation of the irrigable land in his entry or any legal subdivision thereof, the Secretary of the Interior may, in his discretion, allow such entryman or assignee five years from notice within which to perfect the entry in the manner required of a homestead entryman.

That any desert-land entryman or his assignee entitled to the benefit of the last preceding paragraph may, if he shall so elect within sixty days from the notice therein provided, pay to the receiver of the local land office the sum of 50 cents per acre for each acre embraced in the entry, and thereafter perfect such entry upon proof that he has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than \$1.25 per acre, and that he has, in good faith, used the land for agricultural purposes for three years and the payment to the receiver, at the time of final proof, of the sum of 75 cents per acre: *Provided*, That in such case final proof may be submitted at any time within five years from the date of the entryman's election to proceed as provided in this section, and in the event of failure to perfect the entry as herein provided, all moneys theretofore paid shall be forfeited and the entry canceled.

This is a remedial statute and the above paragraphs are intended to afford relief to entrymen under entries made prior to July 1, 1914, that were pending on the date of the passage of said act, and who in good faith attempted to reclaim the land but were unable to do so. From the instructions of the Department of April 13, 1915 (44 L. D., 56), it will be seen that the act is given a broad interpretation to bring within its terms cases where expenditures have been made in good faith, regardless of whether the same are such as would satisfy the requirements for annual proof. Section 7 thereof deals with this question, and provides that—

Any expenditure which the claimant can show that he has made in good faith and with a reasonable belief that it would tend to effect reclamation of the land will be acceptable, even though such expenditure may not have been such as would satisfy the requirements for annual proof.

These instructions do not modify the rule announced in the Herren-Hicks case; but cases may arise under the act of March 4, 1915, *supra*, wherein that rule is not applicable.

From a careful consideration of the situation here presented, it is believed that the entryman is entitled to credit for the expenditures made by him under his former entry should he apply for the benefit of the act of March 4, 1915, *supra*.

The decision of the Commissioner is reversed.

LUCINDA GIBSON ET AL.

Decided July 10, 1916.

ADDITIONAL HOMESTEAD ENTRY—QUALIFICATIONS—ACT APRIL 28, 1904.

The qualifications to make additional homestead entry under the act of April 28, 1904, must exist at the date of entry; and entry under that act can not be allowed where the applicant is not at that time the owner of the land embraced in his original entry, as required by the act, notwithstanding he owned and occupied it at the date of the filing of his application.

JONES, *First Assistant Secretary*:

This is an appeal by Lucinda Gibson, Enoch Youngstrom, Arthur Nichols and Merrill S. Montague, from a decision of the Commissioner of the General Land Office, dated January 20, 1916, adjudicating their conflicting homestead applications for certain lands herein-after described.

November 5, 1914, supplemental plat of Sec. 18, T. 5 N., R. 38 E., B. M., Blackfoot, Idaho, was filed in the local office. Applications filed for lands therein were received and acted upon under the circular of May 22, 1914 (43 L. D., 254). Applications were filed as follows:

018958, Lucinda Gibson, November 5, 1914, for lots 7, 8, 9, 10 and 13, of said Sec. 18;

018959, Enoch Youngstrom, November 5, 1914, for lots 11, 12, 14 and 15, of said Sec. 18;

018864, Arthur Nichols, October 23, 1914, for lot 11, Sec. 7, lots 7, 10, 12 and 13, of said Sec. 18;

018880, Merrill S. Montague, October 26, 1914, for lot 5, Sec. 13, T. 5 N., R. 37 E., and lots 8 and 9, of said Sec. 18.

Gibson accordingly conflicted with Montague as to lots 8 and 9, and with Nichols as to lots 7, 10 and 13; Youngstrom with Nichols as to lot 12. The applications were treated as simultaneous under the circular of May 22, 1914, *supra*, and a hearing ordered to determine the rights of the parties, all of whom alleged prior settlement. The hearing was held May 5, 1915, and by decision of July 20, 1915, the register and receiver held that Montague's application should be allowed in its entirety; that Nichols's should be allowed, except as to lot 12, for which a drawing should be had with Youngstrom under paragraph 4 of the circular of May 22, 1914; and that Gibson's application should be rejected *in toto*. The Commissioner, in the decision now under review, held that Montague's application should be entirely rejected, Gibson's allowed as to lots 8 and 9, Nichols's as to lots 7 and 10, Gibson and Nichols to draw as to lot 13, and Youngstrom and Nichols as to lot 12.

The Department finds that the concurring conclusions below, to the effect that neither Youngstrom nor Gibson had initiated valid settlement rights prior to their applications, were correct. The findings below that lot 12 was not embraced in Nichols's settlement claim are also warranted by the record. The Commissioner's decision, therefore, directing that a drawing be had as between Youngstrom and Nichols as to lot 12 is affirmed. The record, however, discloses that Nichols's settlement claim did embrace lot 13, and no reason is perceived for the Commissioner's ruling that Gibson and Nichols should draw for lot 13. Nichols's application should be allowed as to lot 13 and Gibson's application therefor rejected.

Montague, upon November 5, 1903, made homestead entry No. 9395 for lot 1, Sec. 13, T. 5 N., R. 37 E., upon which final proof was made March 18, 1909, final certificate No. 02142 issuing March 19, 1909, and patent October 28, 1909. Montague's present application is presented under section 2 of the act of April 28, 1904 (33 Stat., 527), which provides as follows:

That any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided, That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry:*

And provided, That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled.

The testimony at the hearing disclosed that the original homestead entry of Montague had been subject to a mortgage, which was foreclosed, the foreclosure sale taking place March 28, 1914. It is stated that under the laws of Idaho he had the period of one year within which to redeem, but the record discloses that he failed to so redeem and that sheriff's deed was accordingly issued to one Robert T. Gibson, the purchaser at foreclosure sale. The register and receiver held that Montague was qualified to make entry under the above act of April 28, 1904, at the time of filing his application, and the fact that he later became disqualified was immaterial. The Commissioner held that the sale upon foreclosure passed the legal title to the purchaser and that, therefore, Montague was not qualified to make entry since he no longer owned his original entry at the time of filing his present additional application. It is contended upon behalf of Montague that under the laws of Idaho the legal title is not divested by the foreclosure sale but remains in the original owner until after the expiration of the period of redemption and until the execution of the sheriff's deed. The opposing contention to this is that while Montague may have been qualified at the time of presenting his application, it is now clear that he is not qualified to make entry and that his qualification must be determined as of the date of entry and not as of the date of application.

In the adjudication of the present matter the Department will assume that the parties have correctly stated the law of Idaho.

In the case of *Clark v. Mansfield* (24 L. D., 343), Clark had settled upon certain land in February, 1884, continuing to reside thereon until March 25, 1889. He filed his application to enter under the homestead laws October 27, 1887, action upon which, however, was suspended pending the adjudication of his controversy with a railroad company, which also claimed the land under an indemnity selection. Section 5 of the act of March 3, 1891 (26 Stat., 1095), enacted a new provision to the law in the following words:

But no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law.

March 8, 1894, Mansfield filed his homestead application alleging settlement March 4, 1894. The Commissioner of the General Land Office held that Clark's application should be rejected and that of Mansfield should be allowed, which ruling was reversed by the Department. The Department there said at page 347:

According to law and the facts of the case, Clark was then and there, to wit: on October 27, 1887, entitled to have his application allowed and to make his homestead entry. But action upon his application was suspended by Secretary Lamar's order above quoted, until the company's claim should be disposed of

by this Department. This was not done until February 21, 1894, more than six years after the date of Clark's application to make entry. Then Clark promptly secured a hearing, and a judgment of the local officers in his favor. Clark is not responsible for the delay. He has been guilty of no laches. He has diligently prosecuted and insisted upon his rights, which must be determined and measured by the laws as they were on October 27, 1887, when he did all that he could do, or be required to do, to perfect the homestead entry, which he had initiated on February 4, 1884, by settlement and continuous subsequent residence. The act of March 3, 1891, above quoted is not applicable in this case. Clark is now entitled to a decision recognizing and establishing his rights as they were at the time of the filing of his application to make entry.

It should be noted that in the above case Clark had fully complied with the homestead laws and presented his application showing full qualifications then existing in him. This had all occurred prior to the passage of the act of March 3, 1891, *supra*, relied upon by the Commissioner as effecting a disqualification. In other words, Clark had filed a proper application, had made a full compliance with law, and was then fully qualified under the homestead laws, no disqualification arising by any act of his own. It was there sought to apply a later disqualifying act to one who had, in all intents and purposes, perfected his homestead entry before the passage of the later law.

In *Brown v. Cagle* (30 L. D., 8), it was held that the qualifications requisite on the part of a homesteader must exist at the date of entry. The facts there were that an unmarried woman settled upon public land, but became disqualified by marriage prior to the presentation of her application and entry. In *Case v. Kupferschmidt* (30 L. D., 9), it was held that the qualifications requisite to make homestead entry must exist at the date of entry and that any rights acquired by the filing of an application were lost where the applicant subsequently and prior to entry becomes disqualified to enter. The facts there were that one Case, an unmarried woman, filed her application under the homestead law, April 5, 1898, which was erroneously rejected by the register and receiver for the reason that there was an outstanding preference right to entry under the contest law in one Bennett. Kupferschmidt made entry April 26, 1898. The Commissioner of the General Land Office held that Case's application had been erroneously rejected, directed that it be allowed and that of Kupferschmidt canceled. Kupferschmidt appealed to the Department, and during the pendency of that appeal Case was married. The Department, under that state of facts, held that Kupferschmidt's entry should remain intact, since Case had become disqualified from making homestead entry.

In *Wright et al. v. Smith* (44 L. D., 226), it was held that while a homestead application should not be allowed after the lapse of a considerable time from the filing thereof without a showing on the part of the applicant of his then qualification to enter, yet where entry is allowed without such showing and the applicant subsequently fur-

nishes proof of his continuing qualification to the date of the entry, it should be recognized as effective from the date of its allowance. Smith there had filed her homestead application April 16, 1910, in which she made a showing of her qualifications, which was suspended pending a termination of a protest filed by Wright *et al.* The Department finally directed that Smith should be allowed to make entry provided she should be duly qualified, and her entry was allowed December 16, 1912. The Department stated at page 228:

The entrywoman first filed her application on April 16, 1910, as above stated, showing her qualifications to make entry. A controversy which occurred because of the adverse claim of McManus resulted in long delay before final decision upon the merits of the case, and, as a matter of precaution, the Department deemed it advisable to require Smith to show her qualifications at the time of perfecting entry. Such supplemental affidavit was not to be considered as the basis of or initiation of her right, but simply to show that her rights theretofore gained had not been lost by disqualification to enter. It was concluded, as above recited, that her status had not changed since filing her application, and that her entry should stand.

The case of Wright *et al. v.* Smith, from the above résumé thereof, would appear to rest upon the underlying principle that the homestead entryman must show his qualifications at the date of entry.

The act of April 28, 1904, *supra*, provides that it shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry. One who has disposed of his original entry, therefore, can not secure any benefit under the act. To allow Montague to enter the additional tract, notwithstanding his disqualification, would be a violation of the proviso, and any entry so allowed would immediately be subject to contest upon this ground. The decision of the Commissioner rejecting Montague's application is, therefore, correct and is hereby affirmed.

Of the land in controversy, therefore, Gibson's application will be allowed as to lots 8 and 9, Nichols's as to lots 7, 10 and 13, Nichols and Youngstrom will draw as to lot 12, and Montague's application will be rejected.

The Commissioner's decision is modified to the above extent and the matter remanded for further proceedings in harmony herewith.

CENTRAL PACIFIC RY. CO.

Instructions, July 13, 1916.

MINERAL LANDS—RAILROAD GRANT.

Lands containing deposits of diatomaceous earth, in such quantity and of such quality as to render them valuable therefor, are mineral lands and excepted from the grant to the Central Pacific Railway Company.

JONES, *First Assistant Secretary:*

On July 3, 1916, you [Commissioner of the General Land Office] submitted for consideration and advice the report of Special Agent Ralph S. Kelley, dated February 15, 1916, relating to certain tracts

of land in T. 23 N., R. 27 E., M. D. M., and embraced in Central Pacific Railway Company's list 08082, filed July 21, 1913, at Carson City, Nevada. The report indicates that the land contains deposits of diatomaceous earth and should be classed as mineral in character and not within the grant to the company. You suggest that it should now be decided what shall be done in this case, in view of the agent's report, before a long and expensive hearing is had.

In the agent's report it is stated that the lands are underlaid with beds of diatomaceous earth varying in thickness from 20 to 400 feet. The beds appear to outcrop upon the surface of the entire area involved. A brief description of the method of deposition and numerous excerpts from geological works are embodied in the report. The agent cites a table indicating that the average price per ton of this material since 1880 has been about \$10. The finest grade used as polishing powder commands a price of from 2 to 3 cents a pound, but the demand is limited. It is stated that a deposit of the substance very pure in character exists in section 31, T. 18 N., R. 22 E., M. D. M., about 10 miles from Virginia City, Nevada. The material has there been quarried and shipped to New York, where it is manufactured by the Electro-Silicon Co. and put on the market under the trade name of electro-silicon. The report indicates that this deposit was located as placer and patented May 17, 1894. In the township here involved it is stated that a 160-acre placer location, known as the Last Hope claim, was made May 3, 1915, on the NE. $\frac{1}{4}$ of section 12, immediately adjoining one of the tracts listed by the company.

It is indicated that the land is rolling, with no water available for reclamation, and possesses but very little value for grazing, possibly not to exceed 25 to 50 cents per acre. The agent states that it would be easy for the Government to show the thickness, extent, quality, and ease of quarrying of the diatomaceous earth on the land and that these considerations are similar to those occurring in connection with deposits worked and marketed elsewhere. On the other hand, the railroad company could likely show that as a present proposition, it would not be profitable to undertake working and marketing the material except on a very small scale because of distance from market, coupled with limited demand.

The writer concludes that in view of the many and increasing special uses for this material, the land should be classed as mineral and title thereto not granted to the company because it would be detrimental to the mining interests of the State to permit the company to secure lands of this character. A sample of the material taken from one of the 40-acre tracts applied for by the company is submitted. No chemical analysis or microscopic examination of the substance has been made. The agent, however, is certain that beds of workable thickness, varying from five feet up and containing silica, running from 90 to 95 per cent, exist over all the area in ques-

tion. For a brief description of this substance reference is had to the Mineral Resources of the United States, 1914, Nonmetals, recently published by the Geological Survey. The following excerpts are from pages 562 and 563 thereof:

Diatomaceous earth, called also infusorial earth and kieselguhr, is a light earthy material which from some sources is loose and powdery and from others is more or less firmly coherent. It often resembles chalk or clay in its physical properties, but can be distinguished at once from chalk by the fact that it does not effervesce when treated with acids. It is generally white or gray in color, but may be brown or even black when mixed with much organic matter.

Diatomaceous earth is made up of remains of minute aquatic plants and is composed, chemically, of hydrous silica.

Owing to its porosity, it has great absorptive powers and high insulating efficiency and is an effective filter. The hardness, the minute size, and the shape of its grains make it an excellent metal polishing agent.

Heretofore diatomaceous or infusorial earth has been largely used as an abrasive in the form of polishing powders and scouring soaps, but of late its uses have been considerably extended. Because of its porous nature, it has been used in the manufacture of dynamite as a holder of nitroglycerin, but, so far as known, not recently in the United States. It is used by sugar refiners for filtering or clarifying. Its porosity also renders it a nonconductor of heat, and this quality in connection with its lightness has very greatly extended its use as an insulating packing material for safes, steam pipes, and boilers, and as a fire-proof building material. In this country it is reported to be used in the manufacture of records for talking machines. For this purpose it is boiled with shellac, and the resulting product has the necessary hardness to give good results. In Europe, especially in Germany, infusorial earth has lately found extended application. It has been used in preparing artificial fertilizers, especially in the absorption of liquid manures; in the manufacture of water glass, of various cements, of glazing for tiles, of artificial stone, of ultramarine and various pigments, of aniline and alizarin colors, of paper, sealing wax, fire-works, gutta-percha objects, Swedish matches, solidified bromide, scouring powders, papier-mâché, and many other articles. There is a steadily growing demand for it. * * *

During the year the numerous inquiries and communications addressed to the Survey concerning newly discovered deposits and recent developments on new and old deposits have indicated a growing interest in the material. Furthermore, certain large manufacturers of structural material have been considering the use of diatomaceous earth in their products. It may be expected that there will be continued increase of the production of diatomaceous earth.

The table shows production for 1913 and 1914 by Western and Eastern States. It will be noted that the production in the Eastern States is small in quantity but valued per ton at from two to three times as much as the Western output. The difference is due to the fact that the eastern product was sold as high-grade cleansing and polishing preparations, whereas the western product went largely into the manufacture of structural materials and insulation. The difference will probably disappear when the projected industries based on the Maryland-Virginia deposits get under way.

The following table taken from page 561 of the same publication indicates the marketed production of diatomaceous earth in this country for the years 1913 and 1914 in short tons:

State.	1913		1914	
	Quantity.	Value.	Quantity.	Value.
Western States.....	6,035	\$55,056	10,343	\$98,819
Eastern States.....	551	14,184	669	11,080
Total.....	6,586	69,240	11,012	109,899

The production from western States is from three States only, namely, California, Nevada, and Washington, while the eastern production is from four or more eastern States. Diatomaceous earth is undoubtedly a mineral substance, and if found in such quantity and quality as to render the tracts containing such deposits valuable therefor, constitutes a valuable mineral deposit under the mining laws. See *Pacific Coast Marble Co. v. Northern Pacific R. R. Co.* (25 L. D., 233-247).

Mr. Lindley in his work on mines, 3rd edition, Sec. 98, lays down the following principles for determining the question as to the character of land, whether mineral or not:

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce;—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possessing economic value for use in trade, manufacture, the sciences or in the mechanical or ornamental arts.

In the case of *Bennett et al. v. Moll* (41 L. D., 584) the department had under consideration a deposit which the parties denominated "silica," which it was stated upon analysis was found to contain 95 per cent silica and 5 per cent magnesia and which brought on board cars near the land from \$1.75 to \$2.25 per ton. The Department concluded from a microscopic examination of the sample that the material was a finely divided pumice or volcanic ash and was a silicate rather than silica. The land containing it was held to be mineral land, not subject to disposition under the agricultural laws. In the *Cataract Gold Mining Co.* (43 L. D., 248, 254), the Department said:

The mineral deposit must be a "valuable" one; such a mineral deposit as can probably be worked profitably; for, otherwise, there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws.

Upon the showing made in connection with the Special Agent's report, the Department is convinced that a hearing should be ordered, and if the facts as alleged be established, or conceded by the company, the land should be considered mineral in character and not awarded to the railroad company under its list.

CIRCULAR INSTRUCTIONS
RELATING TO THE
ACQUISITION OF TITLE TO PUBLIC LANDS
IN THE TERRITORY OF ALASKA.

[No. 491.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 19, 1916.

The enactment of new laws relating to public lands in the Territory of Alaska, as well as the later decisions of the courts and the department, have made a revision of the earlier instructions a matter of necessity; the present publication brings such instructions up to date and includes therewith new circular regulations under recent legislation.

DISTRICT LAND OFFICES.

Section 8 of the act of May 17, 1884 (23 Stat., 24), created one land district including the whole of the Territory of Alaska. The act of May 14, 1898 (30 Stat., 409), authorized the President to establish land districts in the Territory at his discretion and discontinue them. Under this authority there have been created three land districts with offices at Juneau, Nome, and Fairbanks, respectively. At Juneau the duties of the office are discharged by a regularly appointed register and receiver of public moneys, while at the other places the marshal of the United States court is ex officio register and the clerk of said court is ex officio receiver of public moneys.

**INSTRUCTIONS RELATIVE TO DESCRIPTION OF LAND IN NOTICES
OF APPLICATIONS FOR PATENT, ETC., IN ALASKA.**

The notices of applications for patent for lands in Alaska are, in many cases, not sufficient to apprise adverse claimants and the public generally of the location of the land applied for, and therefore do not serve the purpose for which such notices are required; nor can the location of the land be ascertained from the application papers themselves and without obtaining information from other sources. This is due principally to the large area of unsurveyed land in the District and remoteness from centers of population of much of the country. In order to give a more definite description of the land applied for, the following special instructions with reference to the

District of Alaska are issued, which are supplemental to but do not change or modify existing regulations:

1. The field notes of survey of all claims within the District of Alaska, where the survey is not tied to a corner of the public survey, shall contain a description of the location or mineral monument to which the survey is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska, which description shall appear in the field notes regardless of whether or not the survey be tied to an existing monument, or to a monument established by the surveyor when making the survey in accordance with existing regulations with reference to the establishment of such monuments. The description of such monument shall appear in a paragraph separate from the description of the courses and distances of the survey.

2. All notices of applications for patent for lands in the District of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the exact location of such claim without an examination of the record or a reference to other sources. The registers and receivers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application.

HOMESTEAD CLAIMS.

Section 1 of the act of May 14, 1898 (30 Stat., 409), extending the homestead laws of the United States to Alaska, was amended by the act of March 3, 1903 (32 Stat., 1028); the general homestead laws are, therefore, in force in the Territory, except in so far as modified by said acts and by the act of July 8, 1916 (Public No. 146).

Section 1 of the act approved May 14, 1898, is as follows:

ACT OF MAY 14, 1898.

SECTION 1. That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said district of Alaska shall be located within or taken from lands in said district: *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all

such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said district: *And it is further provided*, That no homestead shall exceed eighty acres in extent.

AMENDATORY ACT OF 1903.

An act to amend section 1 of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for a right of way for railroads in the District of Alaska," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law: *And provided further*, That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: *And provided further*, That no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further*, That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided*, That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided*, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska. If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; that the location so made shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced; that the record of said location shall, within ninety days from the date of settlement, be filed for record in the recording district in which the land is situated. Said record shall contain the name of the settler, the date of the settlement, and such a description of the land settled upon, by reference to some natural object or permanent monument, as will identify the same; and if, after the expiration of the said period of five years, or at such date as the settler may desire to commute, the public surveys of the United States have not been extended over the land located, a patent shall nevertheless issue for the land included within the boundaries of said location as thus recorded, upon proof to be submitted to the register and receiver of the proper land office, upon proof that he is a citizen of the United States, and upon the further proof required by section twenty-two hundred and ninety-one of the Revised Statutes of the United States as heretofore and herein

amended, and under the procedure in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section ten of the act hereby amended, and under such rules and regulations as shall be prescribed by the Secretary of the Interior as hereinbefore provided, without the payment of any purchase price or other charges, except the ordinary office fees and commissions of the register and receiver, except one dollar and twenty-five cents per acre on land commuted: *And provided always*, That no title shall be obtained hereunder to any of the mineral or coal lands of the district of Alaska: *And it is further provided*, That the right of any homestead settler to transfer any portion of the land so settled upon, as provided by section twenty-two hundred and eighty-eight of the Revised Statutes of the United States, shall be restricted and limited within the district of Alaska as follows: For church, cemetery, or school purposes to five acres, and for the right of railroads across such homestead to one hundred feet in width on either side of the center line of said railroad; and all contracts by the settler made before his receipt of patent from the Government, for the conveyance of the land homesteaded by him or her, except as herein provided, shall be held null and void.

Approved, March 3, 1903 (32 Stat., 1028).

ACT OF JULY 8, 1916.

An act to amend the United States homestead law in its application to Alaska, and for other purposes, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the District of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations of the act approved March third, nineteen hundred and three, chapter one thousand and two, United States Statutes at Large, page one thousand and twenty-eight, be entitled to enter one hundred and sixty acres or a less quantity of unappropriated public land in said District of Alaska, and no more, and a former homestead entry in any other State or Territory shall not be a bar to a homestead entry in Alaska: *Provided*, That nothing herein contained shall be construed to limit or curtail the area of any homestead claim heretofore lawfully initiated.

SEC. 2. That there shall be excepted from homestead settlement and entry under this act the lands in Annette and Pribilof Islands, the islands leased or occupied for the propagation of foxes, and such other lands as have been or may be reserved or withdrawn from settlement or entry.

Approved, July 8, 1916.

REGULATIONS UNDER HOMESTEAD LAW.

The following regulations will govern the procedure under the homestead law as applicable to Alaska:

1. Except as to claims initiated before the passage of the three-year act of June 6, 1912 (37 Stat., 123), homestead entries in the Territory must be perfected under the terms of said act. For full instructions thereunder and information as to other general homestead laws, reference is made to the general homestead circular.

2. Where a claim was initiated before June 6, 1912, by application duly filed, or by settlement on a tract not covered by the public system of surveys, the homesteader may, at his option, perfect title under the three-year act or under the provisions of the old five-year law; the latter requires proof of residence and cultivation during the period indicated, but specifies no proportion of the area which must be cultivated.

INITIATION OF CLAIMS—UNSURVEYED LANDS.

3. Where a settler desires to acquire as a homestead land, any or all of which is unsurveyed, he may initiate his claim by settlement thereon; in order to preserve his rights he must post on the land a notice of his location and within 90 days after the settlement file a copy thereof for record with the commissioner of the recording precinct in which the land is situated. The tract selected must be in rectangular form, not more than 1 mile in length, located by lines running north and south, according to the true meridian, the four corners being marked by permanent monuments. The location notice should contain the name of the settler, the date of the settlement, and such description of the land claimed, by reference to some natural object or permanent monument, as will serve to identify it.

INITIATION OF CLAIMS—SURVEYED LANDS.

4. Where the public system of surveys has been extended over a tract, settlement rights may be established and maintained only in the same manner as is allowed in the United States, as explained in the general homestead circular; as to such claims, no posting or recording of a location notice is required, but an application for entry must be filed at the local United States land office within three months after the date of settlement, in order to preserve the preference right of entry.

5. The application for entry must be made according to the legal subdivisions as shown by the plat of survey; excepting that it must thus conform, there is no restriction as to the shape of the tract which may be entered. Where a settlement was made and a location notice posted and filed for record before the extension of the surveys, the application should make reference thereto; it should be stated also to what extent the land applied for is different from that covered by the notice; and the settler may not abandon all of the subdivisions covered by the location, unless a showing is made which would justify amendment of his claim.

QUALIFICATIONS OF HOMESTEADERS.

6. (a) Any settler who is qualified, so far as personal status is concerned, to make a homestead entry, may enter not exceeding 160 acres in Alaska, unless he has already made a homestead entry or filed a location notice in that Territory, or unless he is disqualified by reason of the 320-acre limitation on the area of the agricultural public land to be acquired by one person, herein below explained. Said area of 160 acres may be entered whether the land be surveyed or unsurveyed. A person who has made homestead entry for less than 160 acres in Alaska, and submitted final proof thereon, may make an additional entry for sufficient land to make up that area, being required to show residence, cultivation, and improvements in connection therewith as though it were an original entry.

(b) Prior to July 8, 1916, a settler on the public lands in Alaska was entitled to enter 320 acres. By the provisions of the act of that date its enactment did not have the effect of limiting or curtailing

the area of any homestead claim lawfully initiated before its passage. Therefore, an entry for as much as 320 acres may be made in any case where a valid settlement on the land was made before July 8, 1916, provided notice thereof has been filed for record in the recording district in which the land involved is situated within 90 days after the settlement, and said settlement has been duly maintained until the filing of the application for entry. However, a person who has exhausted his right in the United States in whole, or in part, is not entitled to homestead more than 160 acres, notwithstanding that he may have made settlement antedating the act of July 8, 1916.

7. (a) Under the act last mentioned, a former homestead entry outside of Alaska does not bar the claimant's right to make homestead entry in that Territory for not exceeding 160 acres; in connection with an application for entry of that area, it is not material whether the homestead entry in the United States proper was perfected or not, and no statement on the subject of such an entry is required. However, if the applicant has made a homestead entry, or filed a location notice, in Alaska, and failed to perfect title to the land involved, he must, in connection with an application for homestead entry of another claim in Alaska, make the same showing required under the general homestead law.

(b) The act of August 30, 1890 (26 Stat., 391), limits to 320 acres the area one person may acquire after that date under the agricultural public land laws. In applying its provisions to a homestead claim for not more than 160 acres in Alaska, a homestead entry in the United States is not to be counted. As to a claim based on settlement before July 8, 1916, it may make up, with the applicant's former entry, a maximum aggregate area of 480 acres; in such cases a former homestead in the United States is counted even though the claimant paid the price of the land before June 5, 1900 (being entitled to restoration of his right); and no entry for more than 160 acres based on settlement before July 8, 1916, can be allowed where the applicant has already had 320 acres, including an entry under the homestead law.

RESERVATIONS AND LIMITATIONS.

8. No entry may extend more than 160 rods (one-half mile) along the shore of a navigable water, and along such shores a space of at least 80 rods must be reserved between claims. (See p. 276 as to reserved spaces.) The use of such space of 80 rods between claims abutting on any navigable stream, inlet, gulf, bay, or seashore may be granted by the Secretary of the Interior to citizens, associations of citizens, or corporations, for landings and wharves, the public being allowed access thereto.

9. A homestead entryman must show residence upon his claim for at least three years; however, he is entitled to absent himself during each year for not more than two periods making up an aggregate of five months, giving written notice to the local land office of the time of leaving the homestead and returning thereto. There must be shown also cultivation of one-sixteenth of the area of the claim during the second year of the entry and of one-eighth during the third year and until the submission of proof, unless the requirements

in this respect be reduced upon application duly filed. The law provides also that the entryman must have a habitable house upon the land at the time proof is submitted.

10. To the extent of not more than 160 acres an entry may be "commuted"; that is, the claimant may show 14 months' residence upon the land and cultivation of one-sixteenth of the area commuted and pay the price of the land (\$1.25 per acre), cash certificate thereupon issuing, followed by patent in the usual manner. In such cases the homesteader is entitled to a five months' absence in each year, but can not have credit for such period, actual presence on the land for 14 months being required. Where a part of a claim only is commuted, the entry may be allowed to remain intact, or the settlement right under a recorded location notice maintained, pending future submission of three-year proof as to the remainder of the land.

11. Residence must be established upon the claim within six months after the date of the entry or the recording of the location notice, as the case may be; but an extension of not more than six months may be allowed, upon application duly filed, in which the entryman shows by his own affidavit, and that of two witnesses, that residence could not be established within the first six months, for climatic reasons, or on account of sickness, or other unavoidable cause. A leave of absence for one year or less may be granted by the local officers to a homesteader who has established actual residence on the land, where failure or destruction of crops, sickness, or other unavoidable casualty has prevented him from supporting himself and those dependent upon him by cultivation of the land.

SUBMISSION OF PROOF—UNSURVEYED LANDS.

12. Where the public system of surveys has not been extended over a duly located homestead, and the settler is prepared to submit proof thereon, by way of commutation or otherwise, he may have a survey of the tract made at his own expense by a deputy surveyor, appointed by the United States surveyor general. After the survey has been completed and been approved by the surveyor general, certified copies of the field notes and plat must be filed at the local United States land office, together with the settler's notice of intention to submit proof upon his claim.

13. The register will thereupon issue notice of the homesteader's intention to submit proof, designating the newspaper of general circulation nearest the land in which publication thereof is to be made; and the claimant must arrange for publication of the notice therein for a period of 60 days. If the newspaper be published daily, there must be 60 insertions of the notice; if daily except Sunday, 52 insertions; if weekly, 9 insertions; and if semiweekly, 18 insertions. Moreover, the entryman must, during said 60 days, keep a copy of the plat and of his notice of intention to submit proof on the claim posted in a conspicuous place on the land. The proof may not be submitted until 30 days after the expiration of the period of publication and posting.

14. On or before the day set for the proof, the claimant must file his formal application for homestead entry of the land, according to the description shown by the plat of survey; on the day set the

claimant and two of the persons named as witnesses in the notice must give their testimony before the officer and at the place named therein. However, where the claimant and his witnesses, or some of them, fail to testify on the day set, the officer should continue the case until the next day, and so on from day to day until all the testimony has been taken; the law does not allow submission of proof beyond 10 days after the day set therefor, and if part or all of the testimony is submitted at a later day, the register and receiver are not authorized to issue final certificate pursuant thereto. When the case is continued in the manner indicated, the officer should, in the most effective way available, convey notice of the continuance to all interested parties, and this should always include a posting of such notice in his office.

15. If the application for entry be filed, the proof be received by the register and receiver and found satisfactory, no protest or adverse claim be filed, and the proper fee and commissions be paid, they will at once place the entry of record; and they will issue final certificate thereon, provided the price of the land be paid in case of commutation, or the final commissions be paid in other cases—the usual testimony fees being also paid.

16. If the proof does not show satisfactory compliance with the provisions of the homestead laws as to residence, cultivation, and improvements, but no adverse claim be filed, the register and receiver will place the homestead entry of record, on payment of the proper fee and commissions; they will, however, withhold final certificate and reject the proof, or call for supplemental evidence (allowing the usual right of appeal), or forward the papers for consideration by this office, as the circumstances of each case appear to require. They will thus forward the papers if there be filed a protest against the acceptance of the proof by the Chief of Field Division, or a sworn protest consisting of the affidavit of a private person, corroborated by that of at least one witness.

17. If during the period of posting and publication of notice, or within 30 days thereafter, any person, corporation, or association asserting an adverse interest in, or claim to, the tract involved or any part thereof files in the land office where the application for entry is pending an adverse claim under oath, setting forth the nature and extent thereof, action on the proof will be suspended and the adverse claimant allowed 60 days after such filing within which to begin action in a court of competent jurisdiction in Alaska to quiet title to such part of the land as is covered by said claim. In such cases no final certificate will be issued, nor the entry for the land placed of record, until a final adjudication of the rights of the parties has been made by the court, or until it shall have been shown that an action was not begun within the period indicated. If an adjudication by the court be had, entry will be made and patent issued in conformity with its final decree.

SUBMISSION OF PROOF—SURVEYED LANDS.

18. Where the public system of surveys has been extended over a tract and homestead entry made in accordance therewith, though the claim may have been initiated by a location, the procedure with regard to submission of proof is the same as in the United States.

(See instructions of January 12, 1915, 43 L. D., 494.) Where proper compliance with the law is shown, no adverse claim appears on the records, and no protest against the proof is filed, it will be accepted and final certificate issued pursuant thereto. The proof may be taken before the register and receiver or before any officer within the land district authorized by law to administer oaths and having a seal of office.

TRANSFERS BEFORE PROOF.

19. In Alaska, as in the United States, a forfeiture of the claim results from a transfer of any part of the land or of any interest therein before the submission of the proof, with certain exceptions specified by law. These are somewhat different in the Territory, there being permitted transfers for church, cemetery, or school purposes to the extent of 5 acres, and for railroad rights of way across the land having an extreme width of 200 feet.

EXTENSION OF PUBLIC SURVEYS IN ALASKA—HOMESTEAD PROOFS.

Where the public surveys of the United States have been extended over a township in Alaska in which a homestead claim has theretofore been located under the act of March 3, 1903 (32 Stat., 1028), or where it is initiated after such extension, then the provision of the act that patent shall issue "under the procedure in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section 10" of the act of May 14, 1898 (30 Stat., 409), has no application, for its effect is limited to cases in which the settler submits proof (by way of commutation or otherwise) before the inclusion of his claim in the public survey system.

2. Unless a special survey of his claim shall have been already approved, the settler must file an application for homestead entry thereof, as provided by section 2289, United States Revised Statutes, same being conformed to legal subdivisions, including his settlement so far as practicable. Publication and posting of notice of his intention to submit proof on the entry shall be made after its allowance by the local officers, in the manner prescribed by the act of March 3, 1879 (20 Stat., 472); and the proof will be submitted, as provided by the laws and regulations applicable to homestead entries in the public-land States, due regard being had to section 7 of the act of March 2, 1889 (25 Stat., 854), amendatory of the act last mentioned. Provided proper compliance with the law is shown, no adverse claim appears on the local records, and all sums due are paid, the register will issue final certificate on the entry.

3. Such an entry may be contested or protested and proceedings had thereunder in accordance with the rules and regulations applicable to similar entries in the public-land States. The questions involved will not be litigated in the courts, but in the Land Department under the general rules of practice.

4. Proof on a homestead entry must be submitted within the land district in which it is situated; but, subject to that condition, the extension of the system of surveys does not preclude the taking thereof, and the execution of all other papers in connection with the entry, before any of the officers indicated in section 10 of the act of May 14, 1898.

SOLDIERS' ADDITIONAL HOMESTEAD ENTRIES.

Section 1 of the act of May 14, 1898 (30 Stat., 409), and the amendatory act of March 3, 1903 (32 Stat., 1028), extended to Alaska not only the laws as to homestead entries but also those provisions of law relating to the acquisition of title through soldiers' additional homestead rights, they being made applicable to unsurveyed as well as to surveyed lands.

1. It is provided in the act of 1903 that no more than 160 acres shall be entered in any single body by scrip, lieu selection, or soldiers' additional homestead right, and the general restrictions as to the extent of claims along navigable waters and reserved spaces between the same apply to rights of this kind.

2. A person seeking to locate soldiers' additional homestead rights must file with the register and receiver of the proper local office an application in duplicate to enter the tract, describing it by approximate latitude and longitude, and otherwise identifying it with as much certainty as may be possible without actual survey. He must also furnish evidence of the prima facie validity of the additional right and of his ownership thereof. The nonmineral and nonsaline affidavit; the affidavit of the locator's citizenship and of his unimpaired ownership of the right, and the affidavit that the land is not occupied or improved by anyone claiming it adversely to the applicant are part of the printed form (4-008-a) of application.

3. The area of the land applied for may not exceed the area of the additional right or rights tendered in cases of unsurveyed lands, herein discussed, since the rule of approximation, which is applicable in connection with applications for regularly surveyed lands, does not apply to applications for unsurveyed lands in Alaska. If the right used is a certificate, or recertified certificate, which exceeds the area of the land entered, evidence of the unused portion may be obtained by procuring a certified copy or photostat of the certificate bearing proper notation as to the amount used.

4. The register and receiver will, upon receipt of the application and evidence, note its filing, designate the original by the current serial number, and transmit it, together with the proof of ownership of the right, to the General Land Office, forwarding the copy to the chief of field division, and furnishing the applicant with a certificate to the surveyor general that a satisfactory application has been filed and that no objection to the survey is known to them. The surveyor general will, if no objection is shown by his records, immediately deliver to the applicant an order for such survey, which will be sufficient authority for any United States deputy surveyor to make a survey of the claim.

5. The survey must be made at the expense of the applicant, and no right will be recognized as initiated by such application unless actual work on the survey is begun within 90 days after the receipt by the applicant of the order issued by the surveyor general as above directed. The rights thus secured will lapse unless the survey is continued to completion without unnecessary delay. The deputy surveyor will certify to the field notes and plat, which must be filed with the surveyor general, together with all proof required by the

laws and regulations. The surveyor general will examine the plat, field notes, and proofs to ascertain whether the regulations have been complied with, and if he finds the work regular he will forward the papers to the General Land Office for approval.

6. On approval of a survey by the Commissioner of the General Land Office the surveyor general will be advised thereof and directed to file the certified copy of the plat and field notes with the register and receiver. They will thereupon notify the applicant that within 60 days from a date fixed by them he must furnish evidence of posting and publication; that on default in this respect the application will be rejected and the survey canceled. The same posting and publication of notice and evidence thereof are required as in case of entries for trade and manufacture; the same rules apply also with reference to the filing and assertion of adverse claims. (See p. 241.)

7. The register and receiver will at once mail a copy of the notice to the Chief of Field Division also, and the application will be subject to contest for any cause affecting its validity, or on account of applicant's failure to comply with the regulations.

8. If an application is filed by an association, it must so appear, and the citizenship and age of each member thereof be shown. If it is made by a corporation, its creation must be established by the certificate of the officer having custody of the records of incorporation at the place of its formation, and it must be further shown that such corporation is authorized by law to hold land in Alaska. A certified copy of the articles of incorporation should be filed.

9. The applicant is required to file a corroborated affidavit, showing that the land contains no workable deposits of coal or petroleum, and that the land is not within an area surrounding a spring and withdrawn by the order of March 28, 1911.

10. The applicant must file corroborated affidavits fully describing all waters situated upon or crossing the land, whether creek, pond, lagoon, or lake, stating their source, depth, width, outlet, and current (whether swift or sluggish), whether or not the same or any of them are navigable for skiffs, canoes, motor boats, launches, or other small water craft, and whether or not the same or any of them constitute a passageway for salmon or other merchantable sea-going fish to spawning grounds. (See p. 276 as to reserved spaces.) He must also file corroborated affidavits, based upon personal knowledge, to the effect that the land is not within any withdrawal or reservation by the Government of the United States; that it is free from any claim by natives of Alaska; that it is not within a distance of 80 rods, along any navigable or other waters, from any land theretofore located by means of any such scrip, or otherwise under the act of May 14, 1898, as modified by the act of March 3, 1903, and that it does not adjoin any other like inland or water-front location, the area of which added to the tract would constitute a single body of land exceeding 160 acres.

11. After all the evidence above indicated, including evidence of posting and publication, shall have been filed, the register will hold the papers during the period allowed for the filing of an adverse claim, and will thereafter transmit them to the General Land Office. The local officers will not allow the entry and issue final certificate in

the absence of instructions so to do; and this rule will apply whether the right be certified or uncertified, the practice of issuing final certificates on certified rights before transmitted being hereby abolished.

SURVEYED LANDS.

It is to be understood that the above statements and instructions apply only to applications for unsurveyed lands. Where it is sought to locate a soldier's additional homestead right on a tract which is included in the public system of surveys, the procedure is not different in any respect from that prescribed in such cases as to surveyed lands in the United States.

NATIONAL FOREST HOMESTEADS.

The act of June 11, 1906 (34 Stat., 235), providing for homestead entries of agricultural lands within national forests, applies to such lands in Alaska. Entries made under said act are limited in area to 160 acres and are subject to the general homestead laws applicable to the United States, except that no commutation is allowed.

These entries may be made only after the lands desired have been listed by the Secretary of Agriculture as agricultural in character and after a declaration by the Secretary of the Interior that the listed lands are subject to settlement and entry.

Information as to the boundaries of the forests, the method of applying for listing, etc., may be obtained by addressing the Forester, Washington, D. C., or the United States District Forester at Portland, Oreg.

TRADE AND MANUFACTURING SITES.

By section 10, act of May 14, 1898 (30 Stat., 409), the following provisions are made:

That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the District of Alaska, in good faith, for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only, not exceeding eighty acres of such land for any one person, association, or corporation, at two dollars and fifty cents per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry, such tract of land not to include mineral or coal lands, and ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or otherwise: *Provided*, That no entry shall be allowed under this act on lands abutting on navigable water of more than eighty rods: *Provided further*, That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings and wharves, with the provision that the public shall have access to and proper use of such wharves and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway: *Provided further*, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or cor-

poration having the prior claim, by reason of actual possession and continued occupation in good faith, shall be entitled to purchase the same, but where several persons are or may be so possessed of parts of the tract applied for the same shall be awarded to them according to their respective interests: *Provided further*, That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the act approved March third, eighteen hundred and ninety-one (twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said act, but subject to the requirements and provisions of this act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods: *And provided further*, That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay, or seashore for landing places for canoes and other craft used by such natives: *Provided*, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act.

That all affidavits, testimony, proofs, and other papers provided for by this act and by said act of March third, eighteen hundred and ninety-one, or by any departmental or Executive regulation thereunder, by depositions or otherwise, under commission from the register and receiver of the land office, which may have been or may hereafter be taken and sworn to anywhere in the United States before any court, judge, or other officer authorized by law to administer an oath, shall be admitted in evidence as if taken before the register and receiver of the proper local land office. And thereafter such proof, together with a certified copy of the field notes and plat of the survey of the claim, shall be filed in the office of the surveyor general of the District of Alaska, and if such survey and plat shall be approved by him, certified copies thereof, together with the claimant's application to purchase, shall be filed in the United States land office in the land district in which the claim is situated, whereupon, at the expense of the claimant, the register of such land office shall cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the District of Alaska, and the applicant shall at the time of filing such field notes, plat, and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days, and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in or claim to the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

Procedure under this statute will be regulated in accordance with the instructions that follow:

1. If the land is surveyed after occupancy, and prior to application therefor, the claim may be presented in conformity with the public surveys, or the applicant, if he so elects, may apply for the tract occupied by him regardless of the survey, and proceed as herein prescribed. Claims initiated by occupancy after survey must conform thereto both in occupation and application. No tract taken may abut more than 80 rods of navigable waters, and the same restrictions as to reserved spaces on such waters apply as do in case of homestead entries.

2. Where the land is unsurveyed, or the applicant does not desire to conform to the survey, he must file at the proper local land office an application in duplicate for entry of the tract occupied by him, describing it by approximate latitude and longitude, and otherwise

identifying it with as much certainty as may be done without actual survey, as set forth in the instructions relative to special surveys in Alaska. (See p. 227.) The register and receiver will thereupon note the filing of the application and designate it by serial number, forwarding one copy to the General Land Office, and the other to the chief of field division. They will furnish the applicant with a certificate to the surveyor general that an application has been filed, and that no objection to the survey is known to them. The surveyor general will, if no objection is shown by his records, immediately deliver to the applicant an order for such survey, which will be sufficient authority for any United States deputy surveyor to make a survey of the claim.

3. The survey must be made at the expense of the applicant and no right will be recognized as initiated by the application unless actual work on the survey is begun within 90 days after the receipt by applicant of the order to be furnished him by the surveyor general as above mentioned; moreover, the rights secured thereby will lapse unless the survey is continued to completion without unnecessary delay. Upon completion of the survey the deputy should certify to the field notes and plat, which must then be filed with the surveyor general.

4. If the surveyor general finds the work of survey regular, and that the regulations have been complied with, he will forward the papers to the General Land Office for approval. If said office approves of the survey, the surveyor general will be advised of its action and directed to file in the local land office a certified copy of the plat and field notes. The register and receiver will fix a certain date, and notify the applicant that he must, within the time limited, furnish evidence of posting and publication of notice of his application, together with proof corroborated by two witnesses showing:

First. The actual use and occupancy of the land for which application is made for the purpose of trade, manufacture, or other productive industry; that it embraces the applicant's improvements and is needed in the prosecution of the enterprise.

Second. The date when the land was first so occupied.

Third. The character and value of improvements thereon, and the nature of the trade, business, or productive industry conducted thereon.

Fourth. That the tract applied for does not include mineral or coal lands, and is essentially nonmineral in character.

Fifth. That no portion of said land is occupied or reserved for any purpose by the United States, or occupied or claimed by any natives of Alaska, or occupied as a town site or missionary station, or reserved from sale, and that the tract does not include improvements made by or in possession of another person, association, or corporation.

Sixth. Whether or not the land abuts on any navigable stream, inlet, gulf, bay, or seashore, and if so that it is not within 80 rods of any other tract sold, entered, or claimed under the act of May 14, 1898, as modified by the act of March 3, 1903 (see p. 276).

Seventh. If the application is made for the benefit of an individual, he must prove his citizenship and age, and that he has not entered, or acquired title to any land entered, under the provisions of this act.

Eighth. If the application is made for the benefit of an association it must so appear, and the citizenship and age of each member thereof be shown.

Ninth. If the application is made for the benefit of a corporation, the proof of incorporation must be established by the certificate of the secretary of the State or Territory or other officer having custody of the record of incorporation, and it must be further shown that such corporation is authorized by the law under which it is incorporated and under laws of Alaska to hold lands in the Territory.

Tenth. In case the application is made for the benefit of an association or corporation, it must appear that each member thereof has not entered or acquired title to any land entered under the provisions of this act.

5. All affidavits may be executed before the register or receiver of the land office in the district in which the land is situated, or anywhere in the United States, before the judge of a court or other officer authorized by law to administer oaths. Unless the above evidence is furnished the application will be rejected and the survey canceled.

6. At the expense of the claimant, the register of the local land office will cause the above-mentioned notice of the application to be published for a period of at least 60 days in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land, and will also transmit a copy thereof to the chief of field division. The applicant himself must, during the period of publication, cause a copy of the plat, duly authenticated, together with a copy of the application to purchase, to be posted in a conspicuous place upon the claim for at least 60 days. The register will cause a copy of the application to purchase to be posted in his office during the period of publication.

7. During that period, or within 30 days thereafter, any person, corporation, or association having or asserting an adverse interest in, or claim to, the tract of land sought to be purchased, or any part thereof, may file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof; and such adverse claimant shall, within 60 days after said filing, begin action to quiet title in a court of competent jurisdiction within the District of Alaska; and in that event no further action will be taken in the local office upon the application to purchase until the final adjudication of the rights of the parties in the court.

8. If, at the expiration of the period prescribed therefor, no adverse claim has been filed, and no other sufficient objection appears to the proposed purchase, cash certificate will issue for the land in the name of the applicant upon his furnishing proof of publication and posting of the notice as required and making due payment for the land at the rate of \$2.50 per acre. The proof must consist of the affidavit of the publisher or foreman of the designated newspaper, or some other employee authorized to act for the publisher, that the notice (a copy of which must be attached to the affidavit) was published for the required period in the regular and entire issue of every number of the paper during the period of publication in the newspaper proper and not in a supplement. Proof of posting on the

claim must consist of the affidavits of the applicant and two witnesses, who of their own knowledge know that the plat of survey and application to purchase were posted as required and remained so posted during the required period. The register must certify to the posting of the notice in a conspicuous place in his office during the period of publication.

9. A failure to make payment for the land at the rate of \$2.50 per acre, for a period of three months after the final adjudication of the rights of the parties by the court, or after the period for filing an adverse claim shall have expired, without any such claim being filed, will be deemed an abandonment of the application to purchase.

SCRIP LOCATIONS.

Aside from the right of the Territory of Alaska to select lands in lieu of tracts to which it may be entitled, under its grant in aid of public schools made by the act of March 4, 1915 (38 Stat., 1214), and which have been lost, no scrip or lieu rights can be located in said Territory except soldiers' additional homestead rights.

TOWN SITES.

The establishment of town sites on public lands in Alaska—except along Government railroads—is governed by section 11 of the act of March 3, 1891 (26 Stat., 1095), which provides:

That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: *Provided*, That no more than six hundred and forty acres shall be embraced in one town-site entry.

The following regulations are prescribed in accordance with said act:

1. If the land is unsurveyed the occupants must, by application to the surveyor general, obtain a survey of the exterior lines of the town site, which will be made at Government expense. There must be excluded from the tract to be surveyed and entered for the town site any lands set aside by the district court under section 31 of the act of June 6, 1900 (31 Stat., 321, 332), for use as jail and courthouse sites, also all lands needed for Government purposes or use, together with any existing valid claim initiated under Russian rule.

2. When the survey of the exterior lines has been approved, or if the townsite is on surveyed land, a petition to the Secretary of the Interior, signed by a majority of the occupants of the land, will be filed in the local office for transmittal to the General Land Office requesting the appointment of a trustee and the survey of the town

site into lots, blocks, and municipal reservations for public use, the expense thereof to be paid from assessments upon the lots occupied and improved on the date of town-site entry. If found sufficient the Secretary of the Interior will designate an officer of the field service of the General Land Office as a trustee to make entry of the town site, payment for which must be made at rate of \$1.25 per acre. If there are less than 100 inhabitants the area of the town site is limited to 160 acres; if 100 and less than 200 to 320 acres; if more than 200 to 640 acres, this being the maximum area allowed by the statute.

3. The trustee will file his application and notice of intention to make proof, and thereupon the register will issue the usual notice of making proof, to be posted and published at the trustee's expense, for the time and in the manner as in other cases provided, and proof must be made showing occupancy of the tract, number of inhabitants thereon, character of the land, extent, value, and character of improvements, and that the town site does not contain any land occupied by the United States for school or other purposes or land occupied under any existing valid claim initiated under Russian rule.

4. The occupants will advance a sufficient amount of money to pay for the land and the expenses incident to the entry, to be refunded to them when realized from lot assessments. Applications for entry will be subject to contest or protest as in other cases.

5. After the entry is made the town site will be surveyed by a United States deputy surveyor into blocks, lots, streets, alleys, and municipal public reservations. Triplicate copies of the plat of this survey will be made; one copy will be retained by the trustee, one be filed in the local recording office, and one on tracing linen to be for the General Land Office. The expense of such survey will be paid from the appropriation for surveys in Alaska reimbursable from the lot assessments when collected.

6. Lands possessed by Indian or native Alaskan occupants shall not be assessed nor conveyed by the trustee. In making the subdivisional survey herein required the surveyor will set apart the Indian possessions and appropriately designate them as such upon the triplicate plats of his surveys, but he will not extend any street or alley upon or across such possessions.

7. The trustee will make a valuation of each occupied or improved lot in the town site, and thereupon assess upon such lots and blocks according to their value such rate and sum as will be necessary to pay all expenses incident to the execution of his trust which have accrued up to the time of such levy. More than one assessment may be made if necessary to effect the purpose of said act of Congress and these instructions.

8. On the approval of the plat by the General Land Office the trustee will publish a notice that he will, at the end of 30 days from the date thereof, proceed to award the lots applied for, and that all lots for which no applications are filed within 120 days from the date of said notice will be subject to disposition to the highest bidder at public sale. Only those who were occupants of lots or entitled to such occupancy at the date of town site entry, or their assigns thereafter, are entitled to the allotments herein provided. Minority and coverture are not disabilities.

9. Claimants should file their applications for deeds, setting forth the grounds of their claims for each lot applied for, which should be verified by their affidavits and corroborated by two witnesses. Such affidavits may be subscribed and sworn to before any officer authorized to administer oaths.

10. Upon receipt of the patent and payment of the assessments the trustee will issue deeds for the lots. The deeds will be acknowledged before an officer duly authorized to take acknowledgments of deeds at the cost of the grantee. In case of conflicting applications for lots the trustee, if he considers necessary, may order a hearing, to be conducted in accordance with the rules of practice. No deed will be issued for any lot involved in a contest until the case has been finally closed. Appeals from any decision of the trustee or from decisions of the General Land Office may be taken in the manner provided by the rules of practice.

11. After deeds have been issued to the parties entitled thereto the trustee will publish notice that he will sell, at a designated place in the town and at a time named, to be not less than 30 days from date, at public outcry, for cash, to the highest bidder, all lots and tracts remaining unoccupied and unclaimed at the date of the trustee's entry, and all lots and tracts claimed and awarded on which the assessments have not been paid at the date of such sale. The notice shall contain a description of the lots and tracts to be sold, made in two separate lists, one containing the lots and tracts unclaimed at the date of entry and the other the lots and tracts claimed and awarded on which the assessments have not been paid. Should any delinquent allottee, prior to the sale of the lot claimed by him, pay the assessments thereon, together with the pro rata cost of the publication and the cost of acknowledging deed, a deed will be issued to him for such lot, and the lot will not be offered at public sale. The notice of public sale will be published for 30 days prior to the date of sale, and copies thereof shall be posted in three conspicuous places within the town site. Each lot must be sold at a fair price to be determined by the trustee, and he is authorized to reject any and all bids. Lots remaining unsold at the close of the public sale in an unincorporated town may again be offered at a fair price if a sufficient demand appears therefor.

12. Immediately after the public sale the trustee will make and transmit to the General Land Office his final report of his trusteeship, showing all amounts received and paid out and the balance remaining on hand derived from assessments upon the lots and from the public sale. The proceeds derived from such sources, after deducting all expenses, may be used by the trustee on direction of the Secretary of the Interior, where the town is unincorporated, in making public improvements, or, if the town is incorporated such remaining proceeds may be turned over to the municipality for the use and benefit thereof. After the public sale and upon proof of the incorporation of the town, all lots then remaining unsold will be deeded to the municipality, and all municipal public reserves will, by a separate deed, be conveyed to the municipality in trust for the public purposes for which they were reserved.

13. The trustee shall keep a tract book of the lots and blocks, a record of the deeds issued, a contest docket, and a book of receipts and disbursements. The necessary stationary, blanks, and blank

books for his use as trustee will be furnished by the General Land Office upon his requisition therefor.

14. The trustee's duties having been completed, the books of accounts of all his receipts and expenditures, together with a record of his proceedings as hereinbefore provided, with all papers, other books, and everything pertaining to such town site in his possession and all evidence of his official acts shall be transmitted to the General Land Office to become a part of the records thereof, excepting from such papers, however, in case the town is incorporated, the subdivisional plat of the town site, which he will deliver to the municipal authorities of the town, together with a copy of the town-site tract book or books, taking a receipt therefor to be transmitted to the General Land Office.

Special instructions as to receipts and disbursements will be given the trustee on his appointment.

ALLOTMENTS TO INDIANS AND ESKIMOS.

The act of May 17, 1906 (34 Stat., 197), provides:

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the District of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said District, and who is the head of a family or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him, not exceeding one hundred and sixty acres.

1. This proceeding will be initiated by a written application to the register and receiver, signed by the applicant and describing the location and extent of the tract applied for, and, if unsurveyed, by as accurate a description as possible by metes and bounds and natural objects. Notice of the application should be posted upon the land, describing the tract applied for in the terms employed in the application, and a copy of such notice should accompany the application. If the signature is by mark, the same must be witnessed by two persons.

2. The applicant must also file his or her affidavit of qualification under the statute, and if claiming under the preference-right clause, the date of the beginning of his occupancy must be given and its continuous nature stated.

3. This must be corroborated by an affidavit of two witnesses, who may be Indians or Eskimos. A nonmineral affidavit must also be filed by the applicant, sworn to only on personal knowledge and not on information and belief.

4. The affidavits may be sworn to before any officer authorized to administer oaths and having a seal. If the application is made by a woman, she must state in her affidavit whether she is single or married, and if married must show what constitutes her the head of a family, as it is only in exceptional cases that a married woman is entitled to an allotment under this act.

5. The register and receiver will number applications for allotments made under this act in accordance with the circular of June 10, 1908, and note the same on the schedules forwarded at the end

of the month, as required by said circular, giving in the "Remarks" column the date of transmittal to the district superintendent.

6. The register and receiver will assist applicants in the preparation of their papers so far as practicable, and, as the act makes no provision for any fees for filing, will make no charge in any of these cases.

7. Allotments shall be subject to the same requirements as to methods of survey, cardinal courses, and permanent marking of boundaries, except for the protection of preference rights acquired by actual occupancy, as lands surveyed under the United States laws in Alaska, in general accordance with the instructions found on page 1, and will not be made on tracts reserved by the United States as shore spaces under the act of March 3, 1903 (32 Stat., 1028), or within national forests, unless founded on actual occupancy prior to the establishment of the forest.

8. The application for allotment, and all papers filed in connection therewith, will, when in due form, be referred by the local office to the Superintendent of United States Public Schools, Bureau of Education, for the district in which the proposed allotment is situated, who will furnish a report with the transmittal of the record to the Commissioner of Education on the following points:

(a) The location of the land, if necessary, to furnish a more accurate description than given in the application.

(b) The special value of the tract, either for agricultural uses or fishing grounds.

(c) What, if any, residence has been maintained on the tract by the applicant.

(d) The value and character of all improvements thereon.

(e) The fitness of the land as a permanent home for the allottee.

(f) The competency of the applicant to manage his own affairs.

(g) The presence or absence of any adverse claims, and, if any such claims exist, a description thereof.

(h) Such other information as may serve to aid in determining whether the application should be allowed, either in whole or in part, together with his recommendation as to the proper action in the premises.

9. On the receipt of the report from the district superintendent, the Commissioner of Education will transmit the same to the General Land Office with his approval, or disapproval, of the recommendations therein made, with such suggestions as to the application as may seem to him appropriate.

10. If the Commissioner of the General Land Office, upon the entire record submitted, shall find the application meritorious, in whole or in part, he will submit the same to the Secretary of the Interior for his approval, and if so approved, special instructions for the survey thereof will then issue in accordance with the terms of the approval.

11. A schedule of all approved allotments will be kept of record in the General Land Office, and, as the act makes no provisions for a patent, a certificate will issue showing the approval of the allotment, and the survey thereof, for delivery to the allottee.

12. Hereafter the register and receiver will require each person applying to enter or in any manner acquire title to any lands,

under any law of the United States, to file a corroborated affidavit to the effect that none of the lands covered by his application are embraced in any pending application for an allotment under this act, or in any pending allotment, and that no part of such lands is in the bona fide legal possession of or is occupied by any Indian or native except the applicant. Persons applying for the right to cut timber under section 11, act of May 14, 1898 (30 Stat., 414), may, however, substitute for the corroborated affidavit a statement signed by the applicant and duly attested by two witnesses setting forth the above facts.

13. Appropriate forms for the use of applicants under this act have been prepared.

MISSION CLAIMS.

The act of June 6, 1900 (31 Stat., 330), section 27, provides:

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use and occupation, and the land at any station not exceeding six hundred and forty acres, occupied as mission stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong, but nothing contained in this act shall be construed to put in force in the district the general land laws of the United States.

Under the terms of said act any organized religious society that was maintaining a missionary station in the Territory of Alaska on June 6, 1900, may apply to the surveyor general of Alaska for the survey of the land so occupied.

The application should be made by the duly authorized representative of the society, whose authority to act should appear.

If the society is incorporated, evidence of the incorporation should be furnished, and application should be made in the corporate name of the society; if not incorporated, the nature of the association and its formation and purpose should be set out, and the application should be made in the name of three or more trustees, as such, all of whom must be members of the association or organization.

The application for survey must describe as specifically as possible the location of the claim, in connection with surrounding monuments or objects, so that it may be readily identified and must be accompanied with proof, which may consist of affidavits duly corroborated by two witnesses, showing:

1. The actual use of the land for missionary purposes and that it embraces the improvements of the applicant society or organization.
2. The date when the land was first so occupied and the extent and character of the occupation.
3. The character and value of the improvements.
4. That no portion of the land is held adversely to the society under rights of prior inception.

The survey will include only such lands, taken in a compact form, as were actually used and occupied for missionary purposes June 6, 1900, not to exceed in any instance 640 acres, and the area will not be extended to embrace lands taken after that date.

When the survey has been made and accepted, in accordance with existing practice governing the survey of sites for trade and manufacturing purposes, certified copies of the field notes and plat with the original proof must be filed in the local land office, and the register will thereupon issue the proper certificate. In the event applications for surveys have been filed with the surveyor general without the required proof, such proof must be furnished before the issuance of patent.

PARKS AND CEMETERIES FOR CITIES AND TOWNS.

The act of Congress approved September 30, 1890 (26 Stat., 502), made the following provisions for the purchase of parks and cemeteries:

That incorporated cities and towns shall have the right, under rules and regulations prescribed by the Secretary of the Interior, to purchase for cemetery and park purposes not exceeding one quarter section of public lands not reserved for public use, such lands to be within three miles of such cities or towns: *Provided*, That when such city or town is situated within a mining district the land proposed to be taken under this act shall be considered as mineral lands, and patent to such land shall not authorize such city or town to extract mineral therefrom, but all such mineral shall be reserved to the United States, and such reservation shall be entered in such patent.

This act is held applicable to the Territory of Alaska (City of Juneau, 36 L. D., 264).

The right of entry under said act is restricted to incorporated cities and towns, and such cities and towns are allowed to make entries of tracts of unreserved and unappropriated public land, by Government subdivisions, not exceeding a quarter section in area, all of which must lie within 3 miles of the corporate limits of the city or town for which the entries are made.

Where on unsurveyed land.—If the public surveys have not been extended over the lands sought by any city or town under the provisions of said act, it will first be necessary for the proper corporate authority to apply to the surveyor general of the district in which the tract in question is located for a special survey of the exterior lines of such tract, the cost of which will be paid out of the current appropriation for "surveying the public lands."

Application and proof.—An application for the purposes indicated herein can only be made by the municipal authorities of an incorporated city or town; and in all cases the entries will be made and patents issued to the municipality in its corporate name, for the specific purpose or purposes mentioned in said act.

The land must be paid for at the Government price per acre, after proof has been furnished satisfactorily showing—

First. Thirty days' publication of notice of intention to make entry, in the same manner as in homestead and other cases.

Second. The official character and authority of the officer or officers making the entry.

Third. A certificate of the officer having custody of the record of incorporation, setting forth the fact and date of incorporation of the city or town by which entry is to be made, and the extent and location of its corporate limits.

Fourth. The testimony of the applicant and two published witnesses to the effect that the land applied for is vacant and unappro-

priated by any other party, and as to whether the same is either mineral in character or located within an organized mining district or within a mining region.

Fifth. In case the land applied for is described by metes and bounds, as established by a special survey of the same, that the applicant and two of the published witnesses have testified from personal knowledge obtained by observation and measurements that the land to be entered is wholly within 3 miles of the corporate limits of the city or town for which entry is to be made.

Certificates.—Where the proof shows that the land is mineral in character, located in a mining district, or is within a region known as mineral lands, the certificate of entry shall contain the following proviso:

Provided, That no title shall be hereby acquired to any mineral deposits within the limits of the above-described tract of land, all such deposits therein being reserved as the property of the United States.

CEMETERIES ACQUIRED BY ASSOCIATIONS OR PRIVATE CORPORATIONS.

The act of Congress approved March 1, 1907 (34 Stat., 1052), authorizes acquisition of title for cemetery purposes as follows:

That the Secretary of the Interior be, and he is hereby, authorized to sell and convey to any religious or fraternal association, or private corporation, empowered by the laws under which such corporation or association is organized or incorporated to hold real estate for cemetery purposes, not to exceed eighty acres of any unappropriated nonmineral public lands of the United States for cemetery purposes, upon the payment therefor by such corporation or association of the sum of not less than one dollar and twenty-five cents per acre: *Provided*, That title to any land disposed of under the provisions of this act shall revert to the United States, should the land or any part thereof be sold or cease to be used for the purpose herein provided.

This act is applicable to Alaska.

Who may enter.—The right to purchase public land for cemetery purposes is limited to religious, fraternal, and private corporations or associations, empowered to hold real estate for cemetery purposes by the laws under which they are organized. Such corporation or association shall be allowed to make but one entry of not more than 80 acres of contiguous tracts by Government subdivisions of nonmineral, unreserved, and unappropriated public land.

Where on unsurveyed land.—If the public surveys have not been extended over the land so sought to be entered, the corporation or association should apply to the proper surveyor general for a special survey of the exterior lines of the tract desired, the cost of which will be paid out of the current appropriation for "surveying the public lands."

The proof must satisfactorily show:

First. Thirty days' publication of notice of intention to make entry, in the same manner as in homestead and other cases.

Second. The official character of the officer or officers applying on behalf of the association or corporation to make the entry, and his or their express authority to do so conferred by action of the association.

Third. A copy of the record, certified by the officer having charge thereof, showing the due incorporation and organization and date

thereof of the association or corporation and its location and address. The law under which it is organized and by which it derives its authority to hold real estate for cemetery purposes must also be cited.

Fourth. That the land applied for is nonmineral, vacant, and unappropriated public land, which must be shown by the testimony of the applicant and two of the advertised witnesses.

Price.—The land must be paid for at such price per acre as shall be determined by the Commissioner of the General Land Office, provided that in no case shall the price be less than \$1.25 per acre.

Entries under this act must issue to the association or corporation in its corporate name, and the granting clause in the certificate should state that the patent to be issued for the tract described is "for cemetery purposes, subject to reversion 'to the United States should the land or any part thereof be sold or cease to be used for the purpose' in said act provided." Inasmuch, however, as the commissioner of this office determines the amount of the purchase price under the existing conditions in each particular case, the register and receiver will, when proof is made to their satisfaction, immediately forward such proof to this office with their recommendation thereon without issuing the final papers. If this office finds the proof satisfactory, the commissioner will fix the purchase price, and the local officers will, on being notified thereof and no objection appearing thereto in their office, notify the applicant of the amount required and allow him 30 days from service of such notice to pay such purchase price, and on receipt thereof the entry will be issued.

SALE AND USE OF TIMBER UPON PUBLIC LANDS.

Section 11, act of May 14, 1898 (30 Stat., 414), provides:

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraisal value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the District from year to year, and payment for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

The act authorizes the Secretary of the Interior (*a*) to sell timber to individuals, associations, and corporations, and (*b*) to permit the free use of timber by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes. The act has reference only to timber upon vacant, unreserved public lands, outside of the limits of national forests, and does not permit of the exporting of the timber out of the Territory of Alaska. The free-use privilege is not extended to associations and corporations.

Pursuant to the authority conferred upon him, the Secretary of the Interior has caused the following rules and regulations to be promulgated:

1. *Limited free use by settlers, etc.*—Persons designated in the last sentence of section 11, act of May 14, 1898, may go upon the vacant, unreserved public lands and take in amount not exceeding a total of 100,000 feet, board measure, or 200 cords, in any one calendar year, in saw logs, piling, cordwood, or other timber, the aggregate of either of which amount may be taken either in whole in any one of the above classes of timber, or in part of one kind and in part another kind or in other kinds, and where a cord is the unit of measure it shall be estimated, in relation with saw timber, in the ratio of 500 feet, board measure, per cord. Where such persons are unable to take such timber in person, they may employ a servant or agent to procure the timber for them. The uses of the timber must be confined to the uses specified in the act. The taking of timber free of charge for sale and speculation is not authorized. Persons who desire to exercise the privileges extended to them in this section are not required to file applications as provided hereinafter, but in order that future complications may be avoided, they must notify the Chief of the Alaskan Field Division, Juneau, Alaska, or the special agent in charge of timber investigations in the district in which the timber is to be cut, by registered letter, of their intention to procure timber under the free-use clause. Each applicant should set forth in his notice the kind and quantity of timber which is to be cut and the use for which it is to be cut and a description of the land on which said cutting is to be done by township and range and by section and sectional subdivision thereof, if it be surveyed, or by natural objects by which it may be identified if it be unsurveyed. A blank form of notice (Form 4-023 f) has been prepared and may be obtained free of charge upon request from the chief of field division or from the special agents stationed in Alaska.

2. *Sales of timber.*—Timber upon the vacant, unreserved public lands, outside of the limits of national forests, will be sold in such quantities as are actually needed and as will be used from year to year. Sales are not limited to residents of Alaska, but may be made to any individual, association, or corporation, provided that the timber is not to be exported from the Territory.

3. *Applications for purchase—Place to file—Contents.*—Applicants to purchase timber must file with the receiver of the United States land office for the district wherein the lands to be cut over are situated, applications in the form prescribed by the Commissioner of the General Land Office (Form 4-023). Blank forms may be obtained free of charge from the local United States land offices at Juneau, Fairbanks, and Nome, or from the special agents of the General Land Office or from the United States commissioners stationed in Alaska, or from the General Land Office, Washington, D. C. Every applicant should read carefully the printed statements and conditions in the application before attaching signature thereto, since he will be held responsible for subscribing to statements as true which he knows or ought to know to be untrue. Before executing an application, an applicant should, if in doubt, ascertain that the lands from which he desires to cut timber are subject to the provisions of

the act. The following information must be incorporated in every application in the blank spaces provided for the purpose:

(a) Name or names, post-office address, residence, and business occupation of the applicant or applicants who apply to purchase timber; (b) the amount in board feet, linear feet, or cord unit of measurement of timber it is desired to purchase; (c) the approximate area of the land on which the timber is located; (d) a description by legal subdivision, if surveyed, or by metes and bounds with reference to some permanent natural landmark, if unsurveyed, of the land from which the timber is desired to be cut; (e) the proposed use of the timber and the place where it is to be used; (f) the amount of money deposited with the application and the form; that is, whether in cash, certified check, or postal money order. Each application must be duly witnessed by two witnesses.

4. *Posting notice on the land.*—After transmitting his application to the receiver, the applicant shall, before commencing to cut the timber applied for, post a notice (Form 4-023c), which will be furnished with the application, in some conspicuous place on the land from which the timber is proposed to be cut, describing the land, and designating the amount and kind of timber that has been applied for and the date on or before which the cutting must be completed. The notice will become null and void unless the timber is cut and prepared for removal within one year from the date of the filing of the application. The application contains a statement to the effect that this requirement will be fulfilled, and neglect on the part of the applicant to fulfill it will be deemed a sufficient ground for revocation of the right to cut and remove any timber under the application. The description in the notice should be identical with the description in the application. This requirement has been adopted in order that others who may desire to file applications to purchase timber or to enter the lands may have notice that the timber has been sold.

5. *Minimum price for which timber will be sold—Payment.*—All timber will be sold hereunder at a reasonable stumpage value. The following rates have been fixed as the minimum rates for which the various kinds of timber will be sold: \$1 per 1,000 feet b. m. for Sitka spruce, hemlock, and red cedar; \$2.50 per 1,000 feet b. m. for yellow cedar; one-half cent per linear foot for piling 50 feet or less in length up to a top diameter of 7 inches; three-fourths cent per linear foot for piling between 50 and 80 feet in length up to a top diameter of 8 inches; 1 cent per linear foot for piling over 80 feet in length up to a top diameter of 8 inches; 50 cents per cord for shingle bolts and cooperage stock; 25 cents per cord for wood suitable only for fuel or mine lagging. A deposit in the sum of \$50, in cash, postal money order, or certified check, where the stumpage value, at the minimum rate, of the material applied for equals or exceeds that amount, or in a sum representing the full stumpage value, at the minimum rate, where such value is less than \$50, must be made as an evidence of good faith at the time that the application is filed. If a permit shall afterwards be issued, the deposit will be applied to the purchase price of the timber. If the issuance of a permit shall be denied and no timber shall have been cut under the application, the amount deposited by the applicant will be returned to him.

After an application is allowed the timber to be sold thereunder will be appraised by a special agent of the General Land Office, and after appraisal said special agent will collect the appraised amount in excess of the sum originally deposited in cash, postal money order, or certified check and give to the applicant a memorandum receipt for the payment, which receipt should be preserved by the applicant until he receives the receiver's official receipt therefor. The special agent will deposit all such moneys, postal money orders, or certified checks with the receiver of public moneys. Official receipts will be issued by the receiver for all payments made by applicants. All postal money orders must be made payable to the order of the receiver and must be drawn on the post office where the office of the receiver is located. Certified checks must be drawn in favor of the receiver on national or State banks or trust companies located in the same city as the depository with which the deposits are to be made, or upon such "out-of-town" banks, the certified checks of which can be cashed by the receiver without cost to the Government. Remittances tendered in any other form than the above-mentioned forms can not be accepted. Postal money orders and certified checks are not to be held as payment for timber until the same are converted into cash by the receiver.

6. *When cutting and removal may begin.*—As soon as the applicant has filed his application with the receiver, made the requisite initial deposit, and posted notice on the land, he may begin to cut and prepare for removal the timber applied for. As soon as practicable after the filing of an application, a field investigation and appraisal will be made by a special agent of the General Land Office. After such investigation and appraisal shall have been made, and after the applicant has paid to the special agent the excess stumpage value, over and above the sum originally deposited, where there is such excess, the special agent will issue a permit (Form 4-023 b), unless he finds that a permit ought not be issued, authorizing the applicant to remove the timber. If for any reason the special agent is unable to make the investigation and appraisal within 60 days after the filing of an application, he will, if he knows of no objection, issue a permit (Form 4-023 b), and the applicant may then remove the timber, provided that he shall first transmit to the receiver the excess stumpage value over and above the sum originally deposited, where there is such excess.

7. *Limitations upon rights acquired under permission to cut timber.*—The permission to cut shall not give the applicant the exclusive right to cut timber from the lands embraced in his application as against any person entitled to the free use of timber under the provisions of the act, unless the area described in the application is limited to 40 acres and, if the lands be unsurveyed, the boundaries thereof are blazed or otherwise marked by him sufficiently to be identified. The cutting of immature timber will not be permitted under these rules and regulations. The timber authorized to be cut under these rules and regulations must be cut and prepared for removal within one year from the date of the filing of the application. Sales of timber will not be authorized unless there is a necessity for the use of the timber within two years from the date of the authorization to cut.

8. *Limitations with reference to area.—Exceptions.*—Withdrawals have been made for various purposes from time to time within the Territory of Alaska, since its purchase by the United States. These rules and regulations are not applicable to the free use or purchase of timber upon such withdrawn areas, unless an exception be made in the order of withdrawal or it is evident from the spirit and intent of the withdrawal order that such exception was intended. By the act of March 4, 1915 (38 Stat., 1214), sections 16 and 36 in each township were granted to the Territory for school purposes and section 33 in each township in the Tanana Valley between parallels 64 and 65 north latitude, and between 145 and 152 degrees of west longitude, and sec. 6, T. 1 S., R. 1 W.; sec. 31, T. 1 N., R. 1 W.; sec. 1, T. 1 S., R. 2 W.; and sec. 36, T. 1 N., R. 2 W., Fairbanks meridian, were reserved in aid of the Territorial agricultural college and school of mines when established by the Territorial Legislature. The timber upon lands reserved for educational purposes will not be subject to disposition hereunder. Alaskan withdrawal No. 1, and Alaska town-sites withdrawals Nos. 1 to 9, inclusive, have been amended so as to permit of the use or purchase of timber within the area of those withdrawals and the executive orders establishing Alaskan timber reserve No. 1, pursuant to the act of March 12, 1914 (38 Stat., 305), expressly state that such timber as shall not be needed by the Alaskan engineering commission for the construction of Alaskan Government-owned railroads, may be disposed of by the Secretary of the Interior. Persons who desire to use or purchase timber on lands within Alaskan timber reserve No. 1, should first inquire of the Alaskan engineering commission, Seward, Alaska, as to whether or not the particular timber which they desire is needed by that commission, and in the event that said timber is not so needed, applications may be filed for the same in manner as hereinbefore provided. The information to be supplied by the applicant in the fulfillment of the requirement set forth in subdivision (d) section 3 of these rules and regulations should contain statements to the effect that the timber is upon lands within the timber reserve and that the engineering commission will consent to its removal. In such cases applications must be filed irrespective of whether the timber is to be procured under the free-use clause or under the purchase clause of the act.

9. *Indian and Eskimo claims and allotments.—Homestead and mining claims.*—All persons desiring to procure timber under these rules and regulations must ascertain whether or not the lands from which they desire to cut are embraced within any allotment approved to an Indian or Eskimo or within any pending application for such allotment, or are within the bona fide legal possession of or occupied by any Indian or Eskimo, and every timber application (Form 4-023) contains a statement to the effect that the lands described in the application are not within such areas, and said statement must be subscribed to by the applicant and be duly witnessed by two witnesses. The cutting of timber on existing homestead, mining, or other claims is not authorized by these rules and regulations, but when a homestead, mining, or other claim shall have been initiated subsequent to the date of the filing of an application hereunder and posting of notice, as required by paragraph 4, such homestead, mining, or other claimant must take the claim, subject to the right of the timber

applicant to cut and remove from the lands described in the application and notice the amount of timber purchased under the terms of the application.

10. *Free use of timber for Army posts and other governmental purposes.*—Persons contracting with Government officials to furnish firewood or timber for United States Army posts or for other authorized governmental purposes may procure such firewood or timber from the vacant unreserved public lands free of charge, provided that the contracts do not include any charge for the value of the firewood or timber. The filing of an application is not required, but it is advisable for contractors to file applications in order that future complications with reference to charge of trespass may be avoided; and when applications are filed, the terms of the contract agreement, the use to which the timber is to be put, and a statement to the effect that no charge is to be made for the stumpage value of the material should be incorporated therein.

11. *Pulp wood—Exportation authorized.*—The act of February 1, 1905 (33 Stat., 628), authorizes the exportation of pulp wood or wood pulp manufactured from timber in the District of Alaska. Sales of timber for manufacture into this kind of material will be made under these rules and regulations.

12. *Fire-killed and fire-damaged timber.*—The act of March 4, 1913 (37 Stat., 1015), provides for the sale of public timber which was killed or permanently or seriously damaged by forest fires which occurred prior to the date of passage of said act. This provision is applicable to the Territory of Alaska. Separate instructions have been promulgated and are contained in Circular No. 258 (42 L. D., 300). The disposition of this class of timber will also be made under these rules and regulations.

13. *Prevention against waste—Precaution against forest fires.*—The cutting of timber under these rules and regulations shall be done in such a manner as to prevent unnecessary waste. All trees shall be utilized to as low a diameter in the tops as possible, and stumps shall be cut as close to the ground as conditions will permit. All brush, tops, lops, and other forest debris made in felling and removing the timber shall be disposed of as best adapted to the protection of the remaining growth and in such manner as shall be prescribed by the special agent who has charge of the investigation. Every precaution shall be taken to prevent forest fires, and persons taking timber hereunder shall assist in suppressing such fires within the areas covered by their applications.

14. *Examination by special agents.*—At convenient times during cutting, or after any sale, the special agent will examine the lands cut over and submit a report or reports to the Commissioner of the General Land Office as to compliance with the terms of the sale, and if he finds that the cutting is being done in violation of the terms of sale he will immediately stop the cutting and report the matter for action. Special instructions have been issued for the guidance of the special agents who are to appraise timber and supervise its cutting and removal.

15. *Prior circular superseded.*—These rules and regulations supersede the rules and regulations of February 24, 1912, contained in Circular No. 85 (40 L. D., 477).

GRANTS IN AID OF PUBLIC SCHOOLS.

By the act of March 4, 1915 (38 Stat., 1214), sections numbered 16 and 36 in every township, not known to be mineral in character at the date of acceptance of survey, on which no settlement has been made before the survey of the land in the field, and which have not been sold or otherwise appropriated by authority of Congress, are reserved for the support of the common schools in Alaska.

Section 33 in each township between parallels 64 and 65, north latitude, and between the one hundred and forty-fifth and one hundred and fifty-second degrees of west longitude, are reserved for the support of a territorial agricultural college and school of mines.

Where any of said sections are lost to the reservations mentioned, in whole or in part, because of prior settlement or sale, or other appropriation under an act of Congress, or where they are wanting or are fractional in quantity, indemnity lands may be designated and reserved in lieu thereof, as provided in the act of February 28, 1891 (26 Stat., 796). The regulations providing for such selections by the States will be followed in Alaska.

As soon as the survey of a township has been made and accepted, the chief of field division will cause investigation and report to be made as to the character of the land included in the reservation; and where a tract is reported by him as mineral, opportunity will be afforded the proper officers of the Territory to disprove such finding.

The Territory is authorized to provide by law for the leasing of said sections, it being stipulated, however, that no greater area than one section shall be leased to any person, association, or corporation, and that leases shall not be for longer periods than 10 years.

MINING CLAIMS.

Instructions only relative to acts of Congress specially applicable to Alaska are included herein; for instructions under the general mining laws consult Circular No. 430, "United States Mining Laws and Regulations Thereunder," which may be had on application to the district land office or the General Land Office, Washington, D. C.

The laws of the United States relating to mining claims were extended to Alaska by section 8, act of May 17, 1884 (23 Stat., 24), providing a civil government for Alaska, in the following terms:

Sec. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys, and the marshal provided for by this act shall be ex officio surveyor general of said district and the laws of the United States relating to mining claims, and the rights incident thereto shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public

domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres, at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

Sections 15 and 26 in the act of June 6, 1900 (31 Stat., 321), making further provision for a civil government for Alaska, again, in specific terms, extended the mining laws of the United States, and all rights incident thereto to the Territory, with certain further provisions with respect to the acquisition of claims thereunder:

SEC. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney General, record separately, in large and well-bound separate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

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Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements;

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: *Provided*, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject matter affected by the instrument is situated, and where the property or subject matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject matter is situated.

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* * * *Provided*, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites, and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further*, All records heretofore regularly made by the United States commissioner at Dyce, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district, including such mining district within six months from the passage of this act.

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SEC. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District of Alaska: *Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, That the rules and regulations

established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the Secretary of War authorizing any person or persons, corporation, or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites.

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PLACER CLAIMS.

The act of August 1, 1912 (37 Stat., 242), modifies and amends the placer-mining law with respect to the location of such claims in the Territory as follows:

That no association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

Sec. 2. That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act.

Sec. 3. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: *Provided*, That one or both of such locations may be included in an association claim.

Sec. 4. That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

Sec. 5. That any placer-mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

The provisions of this act will be administered in accordance with the following instructions:

It is important to note that this act applies exclusively to placer-mining claims located in Alaska on or after August 1, 1912. It does not in any manner relate to lode-mining claims, or placer-mining claims located prior to said date. The terms of the act lay strict limitations and conditions with respect to placer locations made upon or after said date.

Section 1 of the act provides that no association placer claim shall be located after August 1, 1912, in excess of 40 acres. This limitation is positive, whatever may be the number of persons associated

together or whatever the local district rules or regulations may permit.

Said section further provides that on every placer-mining claim located in Alaska after the passage of the act, and until patent therefor has been issued, not less than \$100 worth of labor must be performed or improvements made during each year, including the year of location, for each and every 20 acres or excess fraction thereof included in the claim. This means that the *first* annual expenditure on such a placer-mining location must be accomplished for and during the calendar year in which the claim is located, instead of during the calendar year succeeding that in which the location is made. Moreover, the amount of annual expenditure is dependent upon the size of the claim, it being required that at least \$100 must be expended for each 20 acres or excess fraction thereof embraced in the location.

By section 2 it is provided that no person, as attorney or agent for another, may locate any placer-mining claim unless duly authorized by a power of attorney properly acknowledged and recorded in some recorder's office within the judicial division where the location is made. Furthermore, an authorized agent or attorney can act in making locations of placer-mining claims for only two individual principals or one associate principal during any calendar month, and during that period may not lawfully locate more than two claims for any one principal, either individual or association. No placer claim can lawfully be located except in compliance with and under the limitations of the act.

In order that the Land Department may be fully advised in the premises, the following requirements must be met with regard to applications for placer-mining claims located in Alaska on or after August 1, 1912:

(a) Where location is made by agent or attorney the power of attorney must be in writing and must be executed and acknowledged in accordance with the laws of the Territory of Alaska or of the State, Territory, or District in which it shall be executed. It must be recorded in the proper recorder's office as prescribed by the act. The application for patent must be accompanied by a certified copy of such power of attorney, which must show the recordation thereof, but it will be sufficient if such certified copy is attached to and made a part of the abstract of title.

(b) One of the principal purposes of the act is to limit the number of placer mining locations made in Alaska through agents or attorneys. An agent or attorney can not at one time represent more than *two individuals* or *one association* under powers of attorney. A duly authorized agent may make two locations for each of two individual principals, or for one association principal, during any calendar month, but he can make no further locations during that month for those or other principals.

The application for patent should accordingly be accompanied by the sworn statement of the agent or attorney setting forth specifically the names of all placer-mining claims, together with the date of location and names of the locators, which were located or attempted to be located by him under powers of attorney during the calendar month in which the placer claim applied for was located.

(c) By section 3 it is prescribed that no person shall directly locate, or through an agent or attorney cause or procure to be located, for himself more than two placer-mining claims in any calendar month, provided, however, that one or both of such locations may be included in an association claim.

Whenever a person or an association has participated in the locating of placer-mining claims in Alaska to the extent of two such claims in any calendar month, such person or such association thereby exhausts the right to make placer locations for that month. The application for patent, therefore, for a placer-mining claim located in Alaska on or after August 1, 1912, must contain or be accompanied by a specific statement, under oath, as to each locator who had an interest therein, showing specifically and in detail all placer locations made by him, or in which he was associated, either directly or through any agent or attorney, during the calendar month in which the claim applied for was located. If no locations in excess of those permitted by law were made during such calendar month, a specific statement, under oath, to that effect should be submitted. This showing must be made in addition to that hereinabove required of the agent himself.

Section 4 of the act prohibits the patenting of any placer mining claim located in Alaska after the passage of the act which contains a greater area than that fixed by law or which is longer than three times its greatest width. The surveyor general will be careful to observe the above requirements and will not approve any survey of a placer location which does not in area and dimensions conform to the provisions of law.

By section 5 of the act it is declared that any placer mining claim attempted to be located in violation of the provisions and limitations of the act shall be null and void and the whole area covered by such attempted location may be located by any qualified person the same as if no such prior attempted location had been made. Consequently, any attempted placer location not made in conformity with the act is a nullity, and the land covered thereby is open for and subject to proper location at any time.

It will be observed that the act does not affect the number of claims, lode or placer, and if placer whether located before or after the passage of the act, which may be included in a single application proceeding.

The law governing annual expenditures and improvements upon mining claims in Alaska is found in the act of March 2, 1907 (35 Stat., 1243), as follows:

That during each year and until patent has been issued therefor at least one hundred dollars' worth of labor shall be performed or improvements made on or for the benefit or development of, in accordance with existing law, each mining claim in the District of Alaska heretofore or hereafter located. And the locator or owner of such claim, or some other person having knowledge of the facts, may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars, as aforesaid, and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid

for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements; but if such affidavits be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

SEC. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded.

NOTICE OF APPLICATION.

The notices of applications for patent for lands in Alaska are, in many cases, not sufficient to apprise adverse claimants and the public generally of the location of the land applied for, and therefore do not serve the purpose for which such notices are required; nor can the location of the land be ascertained from the application papers themselves and without obtaining information from other sources. This is due principally to the large area of unsurveyed land in the district and remoteness from centers of population of much of the country. In order to give a more definite description of the land applied for the following special instructions with reference to the Territory of Alaska are issued, which are supplemental to but do not change or modify existing regulations:

The field notes of survey of all claims within the Territory of Alaska, where the survey is not tied to a corner of the public survey, shall contain a description of the location or mineral monument to which the survey is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska, which description shall appear in the field notes regardless of whether or not the survey be tied to an existing monument, or to a monument established by the surveyor when making the survey in accordance with existing regulations with reference to the establishment of such monuments. The description of such monument shall appear in a paragraph separate from the description of the courses and distances of the survey.

All notices of applications for patent for lands in the Territory of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the

exact location of such claim without an examination of the record or a reference to other sources. The registers and receivers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application.

PLATS OF SURVEY.

As to plats of survey of mining claims in the Territory of Alaska, the commissioner will have three photolithographic copies made upon drawing paper, two copies of which, with the original plat, will be forwarded to the surveyor general, the duplicate and triplicate to be signed by him, and the three plats to be filed and disposed of as follows: One plat and the original field notes to be retained in the office of the surveyor general; one plat and a copy of the field notes to be given the claimant, for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district to be retained in his files for future reference. The commissioner will mail one photolithographic copy of the plat, made upon drawing paper, direct to the applicant for survey, or to his agent or attorney, when the application is made by agent or attorney, at his record address, to be used for posting on the land.

A certain number of photolithographic copies will be furnished the surveyor general for sale at a cost of 30 cents each, and a photolithographic copy printed on tracing paper will be furnished the surveyor general, from which blue prints may be made, to be sold at cost.

RATES FOR NEWSPAPER PUBLICATIONS.

Section 2334 provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications in mining cases. Under this authority of law, the following rates have been established as the maximum charges for newspaper publications:

The charge for the publication of notice of application for patent in a mining case, in all districts, exclusive of Fairbanks, Alaska, shall not exceed the legal rates allowed by the laws of the State, wherein the notice is published, for the publication of legal notices, and in no case shall the charge exceed \$7 for each 10 lines of space occupied where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication \$5 shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

For such publications in the Fairbanks district the maximum rate is fixed at \$10 for each 10 lines of space in a daily newspaper for the required period, and at \$7 for the same space and time if publication be had in a weekly newspaper.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates

are established upon the understanding that they are to be in the usual body type used for legal notices.

ABSTRACT.

In the Territory of Alaska the application for patent will be received and filed and the order for publication issued if the abstract showing full title in the applicant is brought down to a day reasonably near the date of the presentation of the application. A supplemental abstract of title brought down so as to include the date of the filing of the application must be furnished prior to the expiration of the 60-day period of publication.

SPECIAL AFFIDAVIT.

The register and receiver will require each person applying to enter or in any manner acquire title to any of the lands in Alaska, under any law of the United States, to file a corroborated affidavit to the effect that none of the lands covered by his application are embraced in any pending application for an allotment under the act of May 17, 1906 (34 Stat., 197), or in any pending allotment; that no part of said land was at the date of the location of the land claimed under the mining law occupied or claimed by any Indian, whose occupancy or claim existed on the date of the acts granting to natives of Alaska the right to hold land used, occupied, or claimed by them (acts of Congress of May 17, 1884, 23 Stat., 24, and June 6, 1900, 31 Stat., 330), and had been continued down to and including date of location; that such land is in the *bona fide* legal possession of the applicant; and that no part of such land is in the *bona fide* legal possession of or is occupied by any Indian or native.

ADVERSE CLAIMS.

The time within which adverse claims may be filed and suit instituted thereon is extended as to such claims in the Territory by the act of June 7, 1910 (36 Stat., 459), which provides:

That in the District of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days' period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office.

In the administration of this act the following instructions should be observed:

The act provides that adverse claims may be filed at any time during the 60-day period of publication or within 8 months thereafter. This provision applies to any application where the 60-day period of publication ended with or ends after June 7, 1910, and operates to enlarge by 8 months additional the time within which an adverse claim may be filed. This provision does not apply to any application under which the 60-day period of publication ended with or before June 6, 1910; for, if no adverse claim was seasonably filed in such case, the statutory assumption that none existed has

arisen, upon the expiration of the publication period, in favor of the applicant.

It is also provided by the act that adverse suits may be instituted at any time within 60 days after the filing of adverse claims in the local land office. This provision applies to any adverse claim under which the 30-day period fixed under the former law for commencing the adverse suit was running on or expired with June 7, 1910, and enlarges such time to a period of 60 days, and also to any adverse claim which is seasonably filed on or after June 7, 1910. Such provision has no operation in a case where, under the former law, the 30-day period within which to institute suit on an adverse claim expired with or ended before June 6, 1910, and the 60-day publication period also expired on or before June 6, 1910.

Registers and receivers of United States land offices in Alaska will exercise the greatest care in applying the provisions of the act, and will allow no mineral entry until after the expiration of the full period granted for the filing of adverse claims. For example, on any application under which the publication period ended with or after June 7, 1910, no entry will in any event be allowed until after the expiration of the eight-months' period following the publication period.

SURFACE ENTRIES OF MINERAL LANDS.

The act of June 22, 1910 (36 Stat., 583), providing for homestead entries of the surface of coal lands with a reservation of the coal to the United States, has not been extended to the Territory of Alaska; nor is the act of July 17, 1914 (38 Stat., 509), providing for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, applicable to the public lands of Alaska.

OIL LANDS.

By order of the President dated November 3, 1910, all the public lands, and lands in national forests in the District (Territory) of Alaska, containing petroleum deposits were withdrawn from settlement, location, sale, or entry, and reserved for classification, and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States.

The order thus made remains in force and effect to the present time.

RIGHTS OF WAY FOR RAILROADS, WAGON ROADS, AND TRAMWAYS.

Sections 2 to 9, inclusive, of the act of May 14, 1898 (30 Stat., 409), relate to rights of way for railroads, wagon roads, and tramways in the District of Alaska. These sections provide:

SEC. 2. That the right of way through the lands of the United States in the district of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road; also the right to take from the lands of the United States adjacent

to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also the right to take for railroad uses, subject to the reservation of all minerals and coal therein, public lands adjacent to said right of way for station buildings, depots, machine shops, side tracks, turn-outs, water stations, and terminals, and other legitimate railroad purposes, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, excepting at terminals and junction points, which may include additional forty acres, to be limited on navigable waters to eighty rods on the shore line, and with the right to use such additional ground as may in the opinion of the Secretary of the Interior be necessary where there are heavy cuts or fills: *Provided*, That nothing herein contained shall be so construed as to give to such railroad company, its lessees, grantees, or assigns the ownership or use of minerals, including coal, within the limits of its right of way, or of the lands hereby granted: *Provided further*, That all mining operations prosecuted or undertaken within the limits of such right of way or of the lands hereby granted shall, under rules and regulations to be prescribed by the Secretary of the Interior, be so conducted as not to injure or interfere with the property or operations of the road over its said lands or right of way. And when such railway shall connect with any navigable stream or tide water such company shall have power to construct and maintain necessary piers and wharves for connection with water transportation, subject to the supervision of the Secretary of the Treasury: *Provided*, That nothing in this act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said district, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said district. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark. That all charges for the transportation of freight and passengers on railroads in the district of Alaska shall be printed and posted as required by section six of an act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior.

Sec. 3. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any tramway, wagon road, or other public highway now located therein, nor prevent the location through the same of any such tramway, wagon road, or highway where such tramway, wagon road, or highway may be necessary for the public accommodation; and where any change in the location of such tramway, wagon road, or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such tramway, wagon road, or highway, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road or tramway: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile, and that where the space is limited the United States district court shall require the road first constructed to allow any other railroad or tramway to pass over its track or tracks through such canyon, pass, or defile on such equitable basis as the said court may prescribe; and all shippers shall be entitled to equal accommodations as to the movement of their freight and without discrimination in favor of any person or corporation: *Provided*, That nothing herein shall be construed as depriving Congress of the right to regulate the charges for freight, passengers, and wharfage.

Sec. 4. That where any company, the right of way to which is hereby granted, shall in the course of construction find it necessary to pass over private lands or possessory claims on lands of the United States, condemnation of a right of way across the same may be made in accordance with section three of the act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean,

and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four: *Provided further*, That any such company, by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, shall have the right at any time within one year thereafter to file the map and profile of definite location provided for in this act, and such preliminary survey and plat shall, during the said period of one year from the time of filing the same, have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right of way.

Sec. 5. That any company desiring to secure the benefits of this act shall, within twelve months after filing the preliminary map of location of its road as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located a map and profile of at least a twenty-mile section of its road or a profile of its entire road if less than twenty miles, as definitely fixed, and shall thereafter each year definitely locate and file a map of such location as aforesaid of not less than twenty miles additional of its line of road until the entire road has been thus definitely located, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of said office and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within one year after the definite location of said section so approved, or if the map of definite location be not filed within one year as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way, stations, and terminals shall cease and become null and void without further action.

Sec. 6. That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said district, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said district for the construction of said wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years, and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States: *Provided*, That such lands may be located concurrently with the line of such road or tramway, and the plat of preliminary survey and the map of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations: *Provided further*, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter, amend, repeal, or grant equal rights to others on contiguous or parallel routes. And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile: *Provided*, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall

decline to grant such right of way if, in his opinion, the interests of the public would be injuriously affected thereby. Nor shall any right to collect toll upon any wagon road in said district be granted or inure to any person, corporation, or company until it shall be made to appear to the satisfaction of said Secretary that at least an average of five hundred dollars per mile has been actually expended in constructing such road; and all persons are prohibited from collecting or attempting to collect toll over any wagon road in said district, unless such person or the company or person for whom he acts shall at the time and place the collection is made or attempted to be made possess written authority, signed by the Secretary of the Interior, authorizing the collection and specifying the rates of toll: *Provided*, That accurate printed copies of said written authority from the Secretary of the Interior, including toll, freight, and passenger charges thereby approved, shall be kept constantly and conspicuously posted at each station where toll is demanded or collected. And any person, corporation, or company collecting or attempting to collect toll without such written authority from the Secretary of the Interior, or failing to keep the same posted as herein required, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and in default of payment of such fine and costs of prosecution shall be imprisoned in jail not exceeding ninety days, or until such fine and costs of prosecution shall have been paid.

That any person, corporation, or company qualified to construct a wagon road or tramway under the provisions of this act that may heretofore have constructed not less than one mile of road, at a cost of not less than five hundred dollars per mile, or one-half mile of tramway at a cost of not less than five hundred dollars, shall have the prior right to apply for such right of way and for lands at stations and terminals and to obtain the same pursuant to the provisions of this act over and along the line hitherto constructed or actually being improved by the applicant, including wharves connected therewith. That if any party to whom license has been granted to construct such wagon road or tramway shall, for the period of one year, fail, neglect, or refuse to complete the same, the rights herein granted shall be forfeited as to any such uncompleted section of said wagon road or tramway, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way shall cease and become null and void without further action. And if such road or tramway shall not be kept in good condition for use, the Secretary of the Interior may prohibit the collection of toll thereon pending the making of necessary repairs.

That all mortgages executed by any company acquiring a right of way under this act, upon any portion of its road that may be constructed in said district of Alaska, shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution and shall be a lien upon all the rights and property of said company as therein expressed, and such mortgage shall also be recorded in the office of the secretary of the district of Alaska and in the office of the secretary of the State or Territory wherein such company is organized: *Provided*, That all lawful claims of laborers, contractors, subcontractors, or material men, for labor performed or material furnished in the construction of the railroad, tramway, or wagon road shall be a first lien thereon and take precedence of any mortgage or other lien.

SEC. 7. That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by act of Congress.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this act or any part thereof; and the right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least one-fourth of the proposed mileage of such railroad, wagon road, or tramway, as indicated by the map of definite location, except by mortgages or other liens that may be given or secured thereon to aid in the construction thereof: *Provided*, That where within ninety days after the approval of this act proof is made to the satisfaction of the Secretary of the Interior that actual surveys, evidenced by designated monuments, were made, and the line of a railroad, wagon road, or tramway located thereby, or that actual construction was commenced on the line of any railroad, wagon road, or tramway, prior to January twenty-first, eighteen hundred and ninety-eight, the rights to inure hereunder shall, if the terms of this act are

complied with as to such railroad, wagon road, or tramway, relate back to the date when such survey or construction was commenced; and in all conflicts relative to the right of way or other privilege of this act the person, company, or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right.

Sec. 9. That the map and profile of definite location of such railroad, wagon road, or tramway, to be filed as hereinbefore provided, shall, when the line passes over surveyed lands, indicate the location of the road by reference to section or other established survey corners, and where such line passes over unsurveyed lands the location thereon shall be indicated by courses and distances and by references to natural objects and permanent monuments in such manner that the location of the road may be readily determined by reference to descriptions given in connection with said profile map.

1. The grant made by these sections does not convey an estate in fee in the lands used for right of way or lands used for station and terminal facilities. The grant is merely of a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States, except as to lands authorized to be sold under section 6 by the Secretary of the Interior, "upon such expressed conditions as in his judgment may be necessary to protect the public interests." The nature of these conditions will depend upon the public necessities and will be governed by the particular circumstances of each case.

2. All persons entering public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as a part of the area of the tract entered.

3. Whenever any right of way shall pass over private land or possessory claims on lands of the United States, condemnation of the right of way across the same may be made in accordance with the provisions of section 4.

INCORPORATED COMPANIES.

4. Any incorporated company desiring to obtain the benefits of these sections is required to file the following papers and maps:

First. A copy of its articles of incorporation duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. A certificate from the secretary of the District of Alaska showing that the company has complied with chapter 23, title 3, act of June 6, 1900 (31 Stat., 528), providing a civil code for the District of Alaska.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according

to the existing law of the State or Territory where organized. (Form 1, Appendix.)

Sixth. A certificate by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2, p. 273.)

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

Eighth. Maps, field notes, and other papers as hereinafter required.

INDIVIDUALS OR ASSOCIATIONS OF INDIVIDUALS.

5. Individuals or associations of individuals making applications for a permit, under section 6, for tramways or wagon roads, are required to file evidence of citizenship. In the case of associations an affidavit must be filed by the principal officer thereof, giving a list of the members, and stating that the list includes all the members. Evidence of citizenship must be furnished for each member of the association. Individuals and associations will also be required to file the maps, field notes, and other papers hereinafter required.

6. All maps and plats must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey thereof, wherever such surveys have been made. The word profile as used in the act is understood to intend a map of alignment. No profile of grades will be required.

7. The maps should show any other road crossed or with which connection is made, and whenever possible the station number on the survey thereof at the point of intersection. All such intersecting roads must be represented in ink of a different color from that used for the line for which the applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map should be too much crowded to be easily read, then duplicate field notes should be filed separate from the map, and in such form that they may be folded for filing. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes on the map. Station numbers should also be given on the map in all cases where changes of numbering occur and where known lines of survey, public or otherwise, are crossed, with distance to the nearest permanent monument or other mark on such line. The map must also show the lines of reference of initial, terminal, and intermediate points, with their courses and distances.

When the lines are located on surveyed land, the maps must show the 40-acre subdivisions; when on unsurveyed land, a meridian should be drawn on maps through initial and terminal points and at intervals of not more than 6 miles, intermediate points.

8. Typewritten field notes, with clear carbon copies, are preferred, as they expedite the examination of applications. All monuments

and other marks with which connections are made should be fully described, so that they may be easily found. The field notes must be so complete that the line may be retraced on the ground. On account of the conditions existing in Alaska, surveys based wholly on the magnetic needle will not be accepted. In that case a true meridian should be established, as accurately as possible, at the initial point. It should be permanently marked and fully described. The survey should be based thereon and checked by a meridian similarly fixed at the terminal point and, when the line is a long one, by intermediate meridians at proper intervals. On account of the rapid convergence of the meridians in these latitudes, such intermediate meridians should be established at such intervals as to avoid large discrepancies in bearings. It will probably be found preferable to run by transit deflections from a permanently established line, with frequent and readily recoverable reference lines permanently marked; and in such surveys occasional true bearings should be stated, at least approximately. On all lines of railroad the 10-mile sections should be indicated and numbered, and on maps of tramways and wagon roads the 5-mile sections shall likewise be indicated and numbered.

9. The maps, field notes, and accompanying papers should be filed in the local land office for the district where the proposed right of way is located.

10. Connections should be made with other surveys, public or private, whenever possible; also with mineral monuments and other known and established marks. When a sufficient number of such points are not available to make such connections at least every 6 miles, the surveyor must make connection with natural objects or permanent monuments.

11. Along the line of survey, at least once in every mile, permanent and easily recoverable monuments or marks must be set and connected therewith, in such positions that the construction of the road will not interfere with them. The locations thereof must be indicated on the maps. All reference points must be fully described in the field notes, so that they may be relocated, and the exact point used for reference indicated.

12. The termini of a line of road should be fixed by reference of course and distance to a permanent monument or other definite mark. The initial point of the survey and of station, terminal, and junction grounds should be similarly referred. The maps, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4, p. 273) should each show these connections.

13. The engineer's affidavit and applicant's certificate must be written on the map, and must both designate by termini (as in the preceding paragraph) and length in miles and decimals the line of route for which right of way application is made. (See Forms 3 and 4.) Station, terminal, or junction grounds must be described by initial point (as in the preceding paragraph) and area in acres (see Forms 7 and 8, p. 274), when they are located on surveyed land, and the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein. When the applicant is an individual the word "applicant" should be used instead of "company," and such other changes made as are necessary on this account.

14. Where additional width is desired for railroad right of way on account of heavy cuts or fills, the additional right of way desired should be stated, the reason therefor fully shown, the limits of the additional right of way exactly designated, and any other information furnished that may be necessary to enable the Secretary of the Interior to consider the case before giving it his approval.

15. The preliminary map authorized by the proviso of section 4 will not be required to comply so strictly with the foregoing instructions as maps of definite location; but it is to be observed that they must be based upon an actual survey, and that the more fully they comply with these regulations the better they will serve their object, which is to indicate the lands to be crossed by the final line and to preserve the company's prior right until the approval of its maps of definite location. Unless the preliminary map and field notes are such that the line of survey can be retraced from them on the ground, they will be valueless for the purpose of preserving the company's rights. The preliminary map and field notes should be in duplicate, and should be filed in the local land office in order that proper notations may be made on the records as notice to intending settlers and subsequent applicants for the right of way.

16. The scale of maps showing the line of route should be 2,000 feet to an inch. The maps may, however, be drawn to a scale of 1,000 feet to an inch when necessary, or, in extreme cases, to 500 feet to an inch. No other scales must be used and should be so selected as to avoid making maps inconveniently large for handling. In most cases, by furnishing separate field notes, an increase of scale can be avoided. Plats of station, terminal, and junction grounds, etc., should be drawn on a scale of 500 feet to an inch, and must be filed separately from the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

17. Plats of station, terminal, and junction grounds must be prepared in accordance with the directions for maps of lines of routes. Whenever they are located on or near navigable waters the shore line must be shown, and also the boundaries of any other railroad grounds or other claims located on or near navigable waters within a distance of 80 rods from any point of the tract applied for.

18. All applications for permits made under section 6 of this act should state whether it is proposed to collect toll on the proposed wagon road or tramway; and, in case of wagon roads, the application must be accompanied by satisfactory evidence, corroborated by an affidavit, tending to show that the public convenience requires the construction of the proposed road, and that the expense of making the same available and convenient for public travel will not be less, on an average, than \$500 per mile. In all cases, if the proposed line of road shall be located over any road or trail in common use for public travel, a satisfactory statement, corroborated by affidavit, must be submitted with the application, showing that the interests of the public will not be injuriously affected thereby.

19. When maps are filed the local officers will make such pencil notations on their records as will indicate the location of the proposed right of way as nearly as possible. They should note that the application is pending, giving the date of filing and name of applicant. They must also indorse on each map and other paper the date

of filing, over their written signature, transmitting them promptly to the General Land Office.

20. Upon the approval of a map of definite location or station plat by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will make such notations of the approval on their records, in ink, as will indicate the location of the right of way as accurately as possible.

21. When the road is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6, p. 274) should be filed in the local land office in duplicate for transmission to the General Land Office. In case of deviations from the map previously approved, whether before or after construction, there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.

22. Unless the proper evidence of construction is filed within the time prescribed by the act for the construction of each section of the road, appropriate steps will be taken looking to the cancellation of the approval of the right of way and the notations thereof on the records.

CHARGES FOR TRANSPORTATION OF PASSENGERS AND FREIGHT.

23. In the case of a wagon road or tramway built under permit issued under section 6 of this act, upon which it is proposed to collect toll, a printed schedule of the rates for freight and passengers should also be filed with the Commissioner of the General Land Office for submission to the Secretary of the Interior for his consideration and approval at least 60 days before the road is to be opened to traffic, in order to allow a sufficient time for consideration, inasmuch as by section 6 it is made a misdemeanor to collect toll without written authority from the Secretary of the Interior. In the case of a wagon road satisfactory evidence, corroborated by affidavit, must be submitted with said schedule, showing that at least an average of \$500 per mile has been actually expended in constructing such road. These schedules must be submitted in duplicate, one copy of which, bearing the approval of the Secretary of the Interior, will be returned to the applicant if found satisfactory. Said schedules shall be plainly printed in large type.

FORMS FOR DUE PROOFS AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR RAILROADS, TRAMWAYS, WAGON ROADS, ETC.

FORM 1.

I, _____, secretary (or president) of the _____ company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of _____; and that the copy of the articles of association (or incorporation) of the company filed in the Department

of the Interior under the act of May 14, 1898 (30 Stat., 409), is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL OF COMPANY.]

_____ of the _____ Company.

FORM 2.

STATE OF _____,
County of _____, ss:

I, _____, do certify that I am the president of the _____ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

[SEAL OF COMPANY.]

President of Company.

FORM 3.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the _____ company; that the survey of the said company's line of (railroad, tramway, or wagon road) described as follows: (Here describe the line of route as required by paragraph 12), a length of _____ miles, was made by him (or under his direction) as chief engineer of (or as surveyor employed by) the company and under its authority, commencing on the _____ day of _____, 19____, and ending on the _____ day of _____, 19____; that the survey of the said land is accurately represented on this map and by the accompanying field notes; and that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map. (In the case of a tramway or wagon road, add the following: The said line of road does not lie upon nor cross any road or trail in common use for public travel except as shown on this map.)

Sworn and subscribed to before me this _____ day of _____, 19____.

[SEAL.]

Notary Public.

FORM 4.

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (railroad, tramway, or wagon road), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (railroad, tramway, or wagon road) upon the location shown upon this map; that the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the _____ day of _____, 19____, as the definite location of the said (railroad, tramway, or wagon road) described as follows: (Describe as in Form 3); that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map, and that this map has been prepared to be filed in order to obtain the benefits of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes." "I further certify that the said (railroad or tramway) is to be used as a common carrier of freight and passengers.

President of the _____ Company.

Attest:

[SEAL OF COMPANY.]

Secretary.

* The last sentence to be omitted from applications for wagon-road right of way.

FORM 5.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to construct the railroad, tramway, or wagon road of) the _____ company; that said (railroad, tramway, or wagon road) has been constructed under his supervision, as follows: (describe as in paragraph 12) a total length of _____ miles; that construction was commenced on the _____ day of _____, 19—, and completed on the _____ day of _____, 19—; that the constructed (railroad, tramway, or wagon road) conforms to the map and field notes which received the approval of the Secretary of the Interior on the _____ day of _____, 19—.

Sworn and subscribed to before me this _____ day of _____, 19—.

[SEAL.]

Notary Public.

FORM 6.

I, _____, do hereby certify that I am the president of the _____ company; that the (railroad, tramway, or wagon road) described as follows: (describe as in Form 5) was actually constructed as set forth in the accompanying affidavit of _____, chief engineer (or the person employed by the company in the premises); that the location of the constructed (railroad, tramway, or wagon road) conforms to the map and field notes approved by the Secretary of the Interior on the _____ day of _____, 19—; and that the company has in all things complied with the requirements of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes."

President of the _____ Company.

Attest:

[SEAL OF COMPANY.]

Secretary.

FORM 7.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the _____ company; that the survey of the tract described as follows: (here describe as required by paragraph 12) an area of _____ acres, and no more, was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company), and under its authority, commencing on the _____ day of _____, 19—, and ending on the _____ day of _____, 19—; that the survey of the said tract is accurately represented on this plat and by the accompanying field notes; ^a(that the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the _____ mile to the _____ mile, for which this selection is made); that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes"; that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map, and that to the best of my knowledge and belief there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

Subscribed and sworn to before me this _____ day of _____, 19—.

[SEAL.]

Notary Public.

^a This clause is to be omitted in applications for terminal or junction grounds.

FORM 8.

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the tract described as follows: (here describe as in Form 7) an area of _____ acres, and no more, was made by him as chief engineer of (or as surveyor employed to make the survey by) the said company; that the said survey, as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the said survey, as represented on this map and by said field notes, was adopted by resolution of its board on the _____ day of _____, 19____, as the definite location of said tract for (station, terminal, or junction grounds);^a (that the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the _____ mile to the _____ mile, for which this selection is made); that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes"; that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map; and that, to the best of my knowledge and belief, there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

Attest:

[SEAL OF COMPANY.]

President of the _____ Company._____
Secretary.**RIGHTS OF WAY FOR RESERVOIRS, CANALS, POWER PLANTS, ETC.**

There are no Federal statutes governing the appropriation of water or providing rights of way for reservoirs, canals, or power plants specifically applicable to Alaska.

The department has held that sections 2339 and 2340 of the Revised Statutes protecting priority of possession to the use of water for mining, agricultural, manufacturing, or other purposes, are not operative in Alaska except in so far as they relate to mining claims and the rights incident thereto.

If there had been any doubt as to the applicability of these sections to the Territory prior to the decision in the case of *United States v. Utah Power & Light Co.* (209 Fed. Rep., 554), all doubt seems to be now removed by that decision, which holds, in effect, that the provisions of the act of May 14, 1896 (29 Stat., 120), for right of way for electric power companies supersedes section 2339, so far, at least, as to cases arising since its passage. The reasoning in this case would seem to reach all other purposes of this section now covered by special acts requiring action on the part of the Secretary of the Interior in order to secure a right of way.

On the general applicability of right-of-way laws in the Territory, the Attorney General, responding to an inquiry whether it would be lawful to grant revocable licenses under the act of February 15, 1901 (31 Stat., 790), or easements under the act of March 4, 1911 (36 Stat., 1253), held, after a full review of all the statutes and departmental decisions thereon, and especially of the act of August 24, 1912 (37 Stat., 512), providing for the full organization of the Territory and the extension of all the laws of the United States to the Territory

^a This clause to be omitted in applications for terminal or junction grounds.

not locally inapplicable, that such action was authorized, for the reason that said acts of Congress were now applicable to the public lands in Alaska.

By analogy it would appear that the provisions of sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat., 1095), as amended by section 2 of the act of May 11, 1898 (30 Stat., 404), allowing rights of way to canal and ditch companies formed for purposes of irrigation, are also applicable to public lands in Alaska, and it has been so held since said opinion.

Section 4 of the act of February 1, 1905 (33 Stat., 628), granting rights of way for dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals within and across the forest reserves of the United States, applies to and is operative in forest reserves in the Territory.

The general instructions and regulations regarding various rights of way above referred to are found in departmental circulars relating to such rights in the United States.

SPECIAL RESERVATIONS.

1. RESERVED SPACES ALONG NAVIGABLE WATERS.

In the act of March 3, 1903 (32 Stat., 1028), amending section 1, act of May 14, 1898 (30 Stat., 409), it is provided:

That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims.

The reservation of spaces between claims along the shore of navigable waters, thus directed, is limited in operation to forms of entry for disposition made under said acts, to wit: Homestead entries, soldiers' additional entries or scrip locations, and entries for trade and business.

In administering said acts, in accordance with the instructions herein contained, no surveys will be approved, and no application, selection, filing, or location as above set out, will be allowed for such reserved areas, or to exceed the 160-rod restriction along the shore line as provided in the acts aforesaid.

To make effective the limitations of claims along the shore line and the reservation of 80 rods between all such claims, it is directed that where any claim is so located as to approach within 80 rods of the actual shore line, such claim will be considered as located on the shore for that purpose. Such constructive extension to the shore line of claims so located shall not work a reservation of the land in front of such claims and between them and the shore line, but such lands shall be open and subject to appropriation under and in accordance with any appropriate law, and between all such claims, or the constructive extension thereof, the reserve strip shall extend for a distance of 80 rods from the shore line.

The term "navigable waters" is defined by the act of May 14, 1898, *supra*—

* * * to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of high-water mark.

This definition, however, is not taken as intending to include all nontidal waters that are in fact navigable, irrespective of their extent or suitability for transportation purposes, travel, etc., and such

factors will be considered in passing upon the question of the navigability of nontidal waters.

The limitations as to the 80-rod reserve strip along the shore line is, however, extended by the act of March 3, 1903, *supra*, to "along any navigable or *other waters*." It becomes necessary therefore to define what is included in the expression "other waters," and it is held that the phrase includes all waters of sufficient magnitude to require meandering under the manual of surveys, or which are used as a passageway or for spawning purposes by salmon or other sea-going fish.

Circular No. 247, approved July 7, 1913 (42 L. D., 213), is superseded hereby.

2. MEDICINAL SPRINGS RESERVE.

By Executive order of March 28, 1911, the following order of withdrawal was issued:

It is hereby ordered that the following lands be, and the same are hereby, withdrawn from settlement, location, sale, or entry and reserved for public purposes, to wit, to enable Congress to consider legislation providing for the use of medicinal springs in the public lands in the district of Alaska, subject to all the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910.

All tracts of public lands in the District of Alaska upon which hot springs or other springs the waters of which possess curative properties are located to the extent of 160 acres surrounding each spring in rectangular form, with side and end lines equidistant, as near as may be, from such spring or group of springs.

This order of withdrawal was modified January 24, 1914, by Executive order, as follows:

Under authority of the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), it is hereby ordered that the Executive order dated March 28, 1911, withdrawing "all tracts of public lands in the District of Alaska upon which hot springs or other springs the waters of which possess curative medicinal properties are located to the extent of 160 acres surrounding each spring in rectangular form, with side and end lines equidistant, as near as may be, from such spring or group of springs," be revoked, so far as it applies to lands within national forests.

3. RIGHT OF WAY RESERVED FOR RAILROADS, TELEGRAPH, AND TELEPHONE LINES.

In the act of March 12, 1914 (38 Stat., 305), authorizing the President to locate, construct, and operate railroads in the Territory it was provided:

In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph, and telephone lines to the extent of one hundred feet on either side of the center line of any such road and twenty-five feet on either side of the center line of any such telegraph or telephone lines.

4. ROADWAY ALONG SHORE LINE.

A provision is made in section 10 of the act of May 14, 1898 (30 Stat., 409), that—

A roadway 60 feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway.

The phrase "shore line" as thus used means high-water line.

This reservation occurs in the proviso relating to the reservation between claims abutting on navigable waters; but since it is its purpose to reserve a roadway for public use as a highway along the shore line of navigable waters, it is held to relate to the lands entered or purchased under this act as well as to the reserved lands; otherwise, it would serve little or no purpose. This reservation will not, however, prevent the location and survey of a claim up to the shore line, for in such case the claim will be subject to this servitude and the area in the highway will be computed as a part of the area entered and purchased.

LANDING AND WHARF PERMITS ON RESERVED SHORE SPACES.

Section 10 of the act of May 14, 1898 (30 Stat., 409), reads in part as follows:

That there shall be reserved by the United States a space of 80 rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings and wharves, with the provision that the public shall have access to and proper use of such wharves and landings, at reasonable rates of toll, to be prescribed by said Secretary, and a roadway 60 feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway.

(1) Applications for landing and wharf privileges must be under oath, and should be addressed to the Secretary of the Interior and filed in the proper local land office for transmission to the General Land Office by special letter.

(2) Applications should describe the tracts desired by words and by a preliminary diagram showing their position in connection with adjoining surveys and water front and by courses and distances where not defined by prior surveys. There should be filed diagrams and specifications of the proposed wharves and landings, showing their position in connection with the roadway used by vessels, the width of the channel, and the various soundings. Maps and such other papers as may be necessary to fully show the situation must be furnished. All buildings proposed to be erected should be shown on the diagram accompanying the application, and there should be indicated their use and whether they are for public or private purposes.

In an application by an individual or association, the citizenship of the individual and of the members of the association must be shown.

In case of a corporation, a certified copy of the articles of incorporation, and evidence of organization must be furnished in the same manner as is required where corporations apply for rights of way for railroad purposes.

(3) The use of such land is limited to landings and wharves and all rates of toll to be paid by the public must be submitted for approval of the Secretary of the Interior. The application should be accompanied by a proposed schedule of public toll charges, and if such charges are found to be reasonable the schedule will be approved, subject, however, to revision as the public interests may thereafter require.

(4) If the application be allowed, the supervisor of surveys will instruct a United States surveyor to execute a survey and set permanent monuments to delineate the boundaries of the tract, and a permit will be issued granting the applicant the use of the land sought for landings and wharves, subject to the provisions and conditions prescribed by the statute, which permit will be revocable at the discretion of the Secretary of the Interior. The erection of wharves and piers in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside of established harbor lines, or where no harbor lines have been established, must be in conformity with plans recommended by the Chief of Engineers and authorized by the Secretary of War; consequently such applications will be submitted to the War Department for approval, or such other action as that department may deem proper, before final action is taken in this department.

(5) Reserved spaces between claims upon navigable waters within existing national forests in Alaska are subject to the jurisdiction of the Secretary of Agriculture, pursuant to the act of February 1, 1905 (33 Stat., 628), and permits for the use of such spaces for landings and wharves must be obtained through that department.

CONTESTS.

Contests against entries of public lands in the Territory of Alaska may be initiated by private persons, or on the part of the Government, in the same manner as such proceedings are begun elsewhere in the United States.

The procedure in such cases will be governed by the Rules of Practice, copies of which may be obtained on application to the Commissioner of the General Land Office. The last revision of the Rules of Practice will be found in volume 44 of Land Decisions, beginning page 395.

Paragraph 4 of the instructions of May 21, 1908 (36 L. D., 433), relating to contests against homestead locations, provides as follows:

Homestead locations of lands in the District (Territory) of Alaska may be contested and canceled upon any ground which would warrant the cancellation of a homestead entry of land elsewhere, made under section 2289, R. S.; and contests of this character may be initiated at the proper United States land office by either the Government or any private person, and should be proceeded with in the same manner, and given the same effect as contests against homestead entries elsewhere.

Where a final decision has been rendered in a contest proceeding canceling a homestead location, the register will secure the notation of such judgment on the record of the location in the recording office.

ALASKAN RAILROAD TOWN-SITE REGULATIONS.

Under and pursuant to the provisions of the act of Congress approved March 12, 1914 (38 Stat., 305), entitled "An act to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes," it is hereby ordered that the administration of that portion of said act relating to the withdrawal, location, and disposition of town sites shall be in accordance with the following regulations and provisions, to wit:

REGULATIONS.**RESERVATIONS.**

The Alaskan Engineering Commission will file with the Secretary of the Interior, when deemed necessary, its recommendations for the reservation of such areas as in its opinion may be needed for town-site purposes. The Secretary of the Interior will thereupon transmit such recommendations to the President with his objections thereto or concurrence therewith. If approved by the President, the reservation will be made by Executive order.

SURVEY.

When in the opinion of the President the public interests require a survey of any such reservation, the Secretary of the Interior shall cause to be set aside such portions for railroad purposes as may be selected by the Alaskan Engineering Commission, and cause the remainder, or a part thereof, to be surveyed into urban or suburban blocks and lots of suitable size, and into reservations for parks, schools, and other public purposes and for Government use. Highways should be laid out, where practicable, along all shore lines, and sufficient land for docks and wharf purposes along such shore lines should be reserved in such places as there is any apparent necessity therefor. The plats of such survey will be prepared in triplicate, one for the General Land Office to be on tracing linen, one for the local land office, and one for the recorder of the proper recording district. The survey will be made under the supervision of the Commissioner of the General Land Office and the plats will be approved by him and by the chairman of the Alaskan Engineering Commission.

PUBLIC SALE.

The unreserved lots will be offered at public outcry to the highest bidder at such time and place, and after such publication of notice, if any, as the Secretary of the Interior may direct, and he may appoint or detail some suitable person as superintendent of sale to supervise the same and may fix his compensation and require him to give sufficient bond.

SUPERINTENDENT'S AUTHORITY.

Under the supervision of the Secretary of the Interior, the superintendent of the sale will be, and he is hereby, authorized to make all appraisements of lots and at any time to reappraise any lot which in his judgment is not appraised at the proper amount, or to fix a minimum price for any lot below which it may not be sold, and he may reject any and all bids for any lot and at any time suspend, adjourn, or postpone the sale of any lot or lots to such time and place as he may deem proper.

MANNER.

Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots are offered for sale hereunder, and any person may purchase any

number of lots for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship, or otherwise. If any successful bidder fails to make the payment and file the application and other papers at the time and in the manner hereinafter required, the lot awarded to him may be reoffered for sale, and his right thereto will be forfeited. Nothing herein will prevent the transfer by deed of the interests secured by the purchase and the partial payment for the lot, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made.

TERMS.

No lot will be sold for less than \$25, and no bid exceeding that amount will be accepted unless made in multiples of \$5; the minimum of \$25 on each lot sold for less than \$75 must be paid in cash within the time hereinafter specified, and if the price bid is \$75 or more, one-third of the bid price must be paid in cash within said specified time; the remainder of the purchase price will be divided into five equal annual installments, payable in one, two, three, four, and five years, respectively, from the date of the register's certificate of sale, and no final certificate of entry will be issued until the expiration of said five years and until payment has been made in full for the lot, and no patent will be issued thereon during said period. The successful bidder will be given by the superintendent of sale a memorandum certificate for identification purposes, showing name and address of bidder, lot, and amount of bid, and the bidder must file it with the superintendent of sale before the close of the next succeeding sale day, or the next business day if bid is accepted on last sale day, together with his application to purchase the lot properly filled, signed, and acknowledged before any officer authorized to administer oaths and using an official seal, and accompanied by the cash payment required by these regulations, all on the forms attached hereto, respectively, and hereby approved and made a part of these regulations.

The superintendent of sale will issue a memorandum receipt to the bidder for the money paid, describing the lot purchased, and he will as soon thereafter as possible deposit with the receiver of the proper local land office the money received and file with its officers the papers deposited with him by said bidder, together with his certificate as to successful bidder. Thereupon, if no objection appears, the register will issue his certificate of sale in duplicate and transmit the duplicate copy to said bidder.

If it be deemed advisable, the Commissioner of the General Land Office may direct the receiver of public moneys of the proper district to attend sales herein provided for, in which event the cash payment required shall be paid to said receiver, who will issue his official receipt therefor in lieu of the memorandum receipt of the superintendent of sale.

CONDITIONS AND FORFEITURES.

If any lot or lots sold or any part thereof shall be used for the purpose of manufacturing, selling, or otherwise disposing of intoxicating liquors as a beverage, or for gambling, prostitution, or any unlawful purpose before final payment is made and during a period of

five years from the date of register's certificate of sale, or if the purchaser shall fail during said period to comply with any and all regulations and requirements which the Secretary of the Interior, in his discretion, may make or authorize to be made for the improvement of streets, sidewalks, and alleys, promotion of sanitation and fire protection in the town site, all rights of the applicant under his purchase of said lot or lots shall terminate and a forfeiture thereof and of the payments theretofore made thereon may be declared by the Secretary of the Interior, and his finding of fact thereon shall be final. If any person who has made partial payment on the lot purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot will be forfeited, and the lot, after forfeiture is declared, will be subject to disposition as provided herein. Lots remaining unsold at the close of sale, or thereafter declared forfeited for nonpayment of any part of the purchase price under the terms of the sale, will be subject to future disposition at public sale at such time and place as may thereafter be provided.

WARNING.

All persons are warned against forming any combination or agreement which will prevent any lot from selling advantageously, or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 2373 of the Revised Statutes of the United States, which reads as follows:

Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree, with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation or unfair management hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars or imprisoned not more than two years or both.

WOODROW WILSON.

THE WHITE HOUSE,
19 June, 1915.

Serial No. _____

Receipt No. _____

Application to purchase town lot.

[To be executed in duplicate.]

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

_____, Alaska.

I, _____, post-office address _____, having been declared the successful bidder for Lot No. _____, Block No. _____, in the town site of _____, Alaska, as delineated and designated on the approved plat thereof, containing _____ square feet, do hereby apply to purchase said lot, subject to all the regulations governing the sale thereof, and agree to pay therefor the amount bid by me, viz: _____ dollars (\$ _____), on the following terms, to wit: one-third cash, which is tendered herewith, and the balance in five equal annual installments, payable in one, two, three, four, and five years, respectively, from the date register's certificate of sale issues hereunder; upon failure to pay any installment on or before the day the same becomes due, all

rights under this application, together with the payments theretofore made, may be forfeited by the Secretary of the Interior.

I further agree that if the said lot, or any part thereof, shall be used for the purpose of manufacturing, selling, or otherwise disposing of intoxicating liquors as a beverage, or for gambling, prostitution, or any unlawful purpose, at any time during a period of five years from the date of register's certificate of sale, and prior to the issuance of certificate of final entry, or if, at any time during said period, I, or my successors in interest under this application, shall fail to comply with any regulation or requirement which the Secretary of the Interior, in his discretion, shall make or authorize to be made, for the improvement of streets, sidewalks, and alleys, promotion of sanitation, and fire protection within said town site, then all rights under this application shall terminate and a forfeiture thereof, together with the payments theretofore made, may be declared by the Secretary of the Interior, whose finding of fact shall be final.

(Sign here, full Christian name.)

I hereby certify that the foregoing application and agreement was signed and acknowledged before me this ----- day of -----, 19____, at -----.

(Official designation of officer.)

(NOTE.—No sum less than twenty-five dollars (\$25.00) will be received as the first cash payment, and if one-third the amount bid is less than that sum, proper modification should be made in the above terms of sale relating to payment.)

Certificate as to successful bidder.

-----, Alaska,
-----, 19____.

This is to certify that -----, post-office address -----, has been declared the successful bidder for Lot No. -----, Block No. -----, in the town site of -----, Alaska, and is entitled to purchase said lot. The amount of his bid was ----- dollars (\$-----), on which there has been paid to the undersigned to apply as cash payment the sum of ----- dollars (\$-----).

Superintendent of Sale.

Register's certificate of sale.

U. S. Land Office, -----, Alaska,
-----, 19____.

I hereby certify that the foregoing application has this day been allowed subject to the terms, conditions, and agreements therein set forth.

Register.

(NOTE.—After application has been allowed, the duplicate copy thereof should be transmitted to the applicant.)

Memorandum certificate to successful bidder.

-----, Alaska,
-----, 19____.

This is to certify that -----, post-office address -----, has been declared the successful bidder for Lot No. -----, Block No. -----, in the town site of -----, Alaska, and is entitled to purchase said lot. The amount of his bid was ----- dollars (\$-----).

Superintendent of Sale.

NOTE TO BIDDER.—This memorandum certificate must be surrendered to the superintendent of sale before the close of the next succeeding sale day, or the next business day if bid accepted on the last sale day, together with application to purchase the lot described, accompanied by the cash payment required by the regulations governing the sale, or all rights under the bid will be forfeited.

FORFEITURE OF LOTS UNDER ALASKAN RAILROAD TOWN-SITE REGULATIONS—PROCEDURE.

INSTRUCTIONS OF FEBRUARY 16, 1916.

The following procedure for the forfeiture of lots under the Alaskan Railroad town-site regulations, Executive order approved June 19, 1915, is adopted, to become effective immediately:

1. The purpose hereof is to secure prompt action in cases where there has been any alleged violation of said regulations, or failure to comply with the terms thereof, or of any and all regulations or requirements which the Secretary of the Interior may make, or authorize to be made, pursuant to said Executive order, and to allow the lot purchaser or other party in interest an opportunity to file a denial of the charges against his claim and be heard thereon.

2. Whenever the Chief of the Alaskan Field Division is of the opinion that proceedings to forfeit any lot are warranted, he will prepare a notice of charges, which will be made over his signature as Chief of Field Division, but not under oath or corroborated, in which shall be plainly and briefly stated the grounds upon which the charges are based.

3. The notice must be written or printed and must contain the number of the lot and block and the name of the purchaser or other known party in interest, and shall be prepared in triplicate; the original shall be served as hereinafter directed; one copy shall be forwarded to the register and receiver, who will note the same upon their records and forward it to the Commissioner of the General Land Office, who will promptly cause proper notation to be made upon his records, and no patent or other evidence of title shall issue until and unless the case is closed in favor of the claimant; the third copy shall be retained by the Chief of Field Division for his records.

4. The notice must also state that the charges will be taken as confessed (a) unless the purchaser or claimant files with the Chief of Field Division, within 20 days from the receipt of notice, a written denial, under oath, of said charges, with an application for a hearing, (b) or if he fails to appear at any hearing that may be ordered in the case.

5. The original notice of the charges may in all cases be served personally upon the proper party by any person over the age of 18 years, or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. Proof of personal service shall be the written acknowledgement of the person served, or the affidavit of the person who served the notice showing personal delivery thereof to the party served and stating the time and place of such delivery. Proof of service of notice by registered mail shall consist of the affidavit of the person who mailed the notice attached to the post-office registry return receipt or the returned unclaimed registered letter. Where service of notice is made by an employee of the Government under oath of office, his certificate will be sufficient in lieu of the affidavit otherwise required.

6. If the charges are denied and a hearing asked for, the register and receiver of the proper land district, upon request of the Chief of Field Division, will fix a date and place for a preliminary hear-

ing before any United States commissioner, notary public, judge, or clerk of a court of record, due notice of which must be given the party or parties in interest. Such notice must also designate a date for final hearing before the register and receiver, after which neither the Government nor the defendant may take any testimony except upon proper showing under the rules governing continuances, or upon written stipulation filed in the case. The notice may be served either by securing personal service upon the parties in interest or by registered mail. A copy of said notice shall be sent by ordinary mail to the Commissioner of the General Land Office.

7. The Chief of Field Division will duly submit to the Commissioner of the General Land Office, upon proper form provided therefor, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses, and take such other steps as are necessary to prepare the case for hearing.

8. The Chief of Field Division, or any special agent who may be designated by him, must appear with his witnesses on the date and at the place fixed for the hearing unless there is reason to believe that no appearance by or for the defendant will be made, in which event no appearance on behalf of the Government is required.

9. If the party or parties in interest fail to deny the charges under oath and apply for a hearing, or fail to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate any necessity for the Government to submit evidence in support thereof. In the event of default in denying the charges and applying for a hearing, the Chief of Field Division will forthwith report the case to the Commissioner of the General Land Office, with his recommendation thereon, and notify the parties in interest by registered mail of the action taken; if denial is made and hearing applied for, but defendant or defendants fail to appear at the hearing and fail to show good cause for such failure to appear, the register and receiver will forthwith report the case to the commissioner, with their recommendation thereon, and notify the parties of such action by registered mail.

10. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the charges.

11. After the hearing, if one is had, but not sooner than the day succeeding that named for final hearing, the register and receiver will promptly forward the record to the Commissioner of the General Land Office, with their recommendation in the matter, and will notify all parties in interest of their action by ordinary mail.

12. Depositions may be taken on behalf of either party before any officer authorized to administer oaths, after first giving 10 days' written notice to the opposite party, or they may be taken by stipulation, as provided by Rule 27 of the Rules of Practice.

13. Decision will be rendered by the Secretary of the Interior in cases governed by these regulations, and will be final and close the case. Such decision may be rendered at any time after the expira-

tion of 30 days from the date the record in the case is received by the Commissioner of the General Land Office. Motions or briefs must be filed with the Commissioner of the General Land Office.

14. Where any lot purchaser or joint purchaser, or, in case he has parted with his rights or any interest therein, his successor in interest as transferee, assignee, lessee, permittee, tenant, agent, or under any form of authorization whatsoever, whether express or implied, or any such successor in interest while invested with such interest, has been or shall be duly convicted under the penal statutes of Alaska of an offense which constitutes a violation of the Alaskan Railroad town-site regulations, the Secretary of the Interior may, in his discretion, waive all the provisions of these regulations and, without notice, declare a forfeiture of the lot involved. In such cases the right of any person to be heard by virtue of any transfer or assignment of interest after information or indictment duly presented will not be recognized.

15. The Rules of Practice, where not in conflict herewith, will be applicable to proceedings under these regulations. Notices to which the lot purchaser is entitled will be served upon persons having an interest in the lot, provided a notice of such interest has been filed in the district land office as required by rule 98 of the Rules of Practice.

16. The Alaskan Engineering Commission will make all needful rules and regulations covering the period prescribed by the town-site regulations for the improvement of streets, sidewalks, and alleys, the promotion of sanitation and fire protection or other municipal improvements, and said commission is further authorized to levy and collect such assessments as may be necessary in the premises. If any claimant shall fail to comply with such regulations and requirements, or to pay any and all assessments when due, all the facts in each case shall be reported to the Chief of Field Division, who will then proceed in accordance with the instructions contained herein.

COAL-LAND LAWS.

By the act of October 20, 1914 (38 Stat., 741), "to provide for the leasing of coal lands in the Territory of Alaska," it was provided in section 15 thereof that after the approval of the act no lands in Alaska containing deposits of coal, withdrawn from entry or sale, should be disposed of or acquired in any manner except as provided in the act, protecting, however, all claims pending before the department under existing law.

By Executive orders of November 12, 1906, and July 1, 1910, all lands in Alaska were withdrawn from entry, location, or filing under the coal-land laws, and from location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of coal deposits. This provision, therefore, in section 15 of the leasing act, operates to exclude all lands in the Territory from sale or entry under the coal-land laws, and said laws are in effect repealed as to coal lands in Alaska.

Under date of May 18, 1916, the Secretary of the Interior announced the opening of coal lands for leasing in the Bering River and Matanuska coal fields. The announcement is accompanied with full regulations as to the manner of securing a lease or permit for mining coal in Alaska, together with a copy of the law and the proposed form of the lease.

REGULATIONS GOVERNING COAL-LAND LEASES IN THE TERRITORY OF ALASKA, APPROVED MAY 18, 1916.^a**COAL-LAND LEASING ACT.**

The text of the act (38 Stat., 741) approved October 20, 1914, that provides for the leasing of coal lands in the Territory of Alaska is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and directed to survey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields, and thereafter to such areas or coal fields as lie tributary to established settlements or existing or proposed rail or water transportation lines: *Provided,* That such surveys shall be executed in accordance with existing laws and rules and regulations governing the survey of public lands. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000 for the purpose of making the surveys herein provided for, to continue available until expended: *Provided,* That any surveys heretofore made under the authority or by the approval of the Department of the Interior may be adopted and used for the purposes of this Act.

SEC. 2. That the President of the United States shall designate and reserve from use, location, sale, lease, or disposition not exceeding five thousand one hundred and twenty acres of coal-bearing land in the Bering River field and not exceeding seven thousand six hundred and eighty acres of coal-bearing land in the Matanuska field, and not to exceed one-half of the other coal lands in Alaska: *Provided,* That the coal deposits in such reserved areas may be mined under the direction of the President when, in his opinion, the mining of such coal in such reserved areas, under the direction of the President, becomes necessary, by reason of an insufficient supply of coal at a reasonable price for the requirements of Government works, construction and operation of Government railroads, for the Navy, for national protection, or for relief from monopoly or oppressive conditions.

SEC. 3. That the unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of forty acres each, or multiples thereof, and in such form as in the opinion of the Secretary will permit the most economical mining of the coal in such blocks, but in no case exceeding two thousand five hundred and sixty acres in any one leasing block or tract; and thereafter the Secretary shall offer such blocks or tracts and the coal, lignite, and associated minerals therein for leasing, and may award leases thereof through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, to any person above the age of twenty-one years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States or of any State or Territory thereof: *Provided,* That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States: *And provided further,* That no railroad or common carrier shall be permitted to take or acquire through lease or permit under this act any coal or coal lands in excess of such area or quantity as may be required and used solely for its own use, and such limitation of use shall be expressed in all leases or permits issued to railroads or common carriers hereunder: *And provided further;* That any person, association, or corporation qualified to become a lessee under this act and owning any pending claim under the public-land laws to any coal lands in Alaska may, within one year from the passage of this act, enter into an arrangement with the Secretary of the Interior by which such claim shall be fully relinquished to the United States; and if in the judgment of the Secretary of the Interior the circumstances connected with such claim justify so doing, the moneys paid by the claimant or claimants to the United States on account of such claim shall, by direction of the Secretary of the Interior, be returned and paid over to such person, association, or corporation as a consideration for such relinquishment.

All claims of existing rights to any of such lands in which final proof has been submitted and which are now pending before the Commissioner of the

^a A circular containing detailed descriptions of the leasing units may be obtained from the Commissioner of the General Land Office, Washington, D. C.

General Land Office or the Secretary of the Interior for decision shall be adjudicated within one year from the passage of this act.

SEC. 4. That a person, association, or corporation holding a lease of coal lands under this act may, with the approval of the Secretary of the Interior and through the same procedure and upon the same terms and conditions as in the case of an original lease under this act, secure a further or new lease covering additional lands contiguous to those embraced in the original lease, but in no event shall the total area embraced in such original and new leases exceed in the aggregate two thousand five hundred and sixty acres.

That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the original lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same competitive conditions as in case of an original lease.

SEC. 5. That, subject to the approval of the Secretary of the Interior, lessees holding under leases small blocks or areas may consolidate their said leases or holdings so as to include in a single holding not to exceed two thousand five hundred and sixty acres of contiguous lands.

SEC. 6. That each lease shall be for such leasing block or tract of land as may be offered or applied for, not exceeding in area two thousand five hundred and sixty acres of land, to be described by the subdivisions of the survey; and no person, association, or corporation, except as hereinafter provided, shall be permitted to take or hold any interest as a stockholder or otherwise in more than one such lease under this act, and any interest held in violation of this proviso shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction, except that any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held for two years, and not longer, after its acquisition.

SEC. 7. That any person who shall purchase, acquire, or hold any interest in two or more such leases, except as herein provided, or who shall knowingly purchase, acquire, or hold any stock in a corporation having an interest in two or more such leases, or who shall knowingly sell or transfer to one disqualified to purchase, or except as in this act specifically provided, disqualified to acquire, any such interest, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$1,000: *Provided*, That any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held two years after its acquisition and not longer, and in case of minority or other disability such time as the court may decree.

SEC. 8. That any director, trustee, officer, or agent of any corporation holding any interest in such a lease who shall, on behalf of such corporation, act in the purchase of any interest in another lease, or who shall knowingly act on behalf of such corporation in the sale or transfer of any such interest in any lease held by such corporation to any corporation or individual holding any interest in any such a lease, except as herein provided, shall be guilty of a felony and shall be subject to imprisonment for a term of not exceeding three years and a fine of not exceeding \$1,000.

SEC. 8a. If any of the lands or deposits leased under the provisions of this act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of or are in any wise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, entered into by the lessee, or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of two thousand five hundred and sixty acres in the Territory of Alaska, the lease thereof shall be forfeited by appropriate court proceedings.

SEC. 9. That for the privilege of mining and extracting and disposing of the coal in the lands covered by his lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall not be less than two cents per ton, due and payable at the end of each month succeeding that of the shipment of the coal from the mine, and an annual rental, payable at the beginning of each year, on the lands covered by such lease, at the rate of twenty-five cents per acre for the first year thereafter, fifty cents per acre

for the second, third, fourth, and fifth years, and \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases may be for periods of not more than fifty years each, subject to renewal, on such terms and conditions as may be authorized by law at the time of such renewal. All net profits from operation of Government mines, and all royalties and rentals under leases as herein provided, shall be deposited in the Treasury of the United States in a separate and distinct fund to be applied to the reimbursement of the Government of the United States on account of any expenditures made in the construction of railroads in Alaska, and the excess shall be deposited in the fund known as the Alaska fund, established by the act of Congress of January twenty-seventh, nineteen hundred and five, to be expended as provided in said last-mentioned act.

SEC. 10. That in order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period of not exceeding ten years, on such conditions not inconsistent with this act as in his opinion will safeguard the public interest, without payment of royalty for the coal mined or for the land occupied: *Provided*, That the acquisition of holding of a lease under the preceding sections of this act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such a license shall be no bar to the acquisition or holding of such a lease or interest therein.

SEC. 11. That any lease, entry, location, occupation, or use permitted under this act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein. If such reservation is made it shall be so determined before the offering of such lease.

That the said Secretary during the life of the lease is authorized to issue such permits for easements herein provided to be reserved and to permit the use of such other public lands in the Territory of Alaska as may be necessary for the construction and maintenance of coal washeries or other works incident to the mining or treatment of coal, which lands may be occupied and used jointly or severally by lessees or permittees, as may be determined by said Secretary.

SEC. 12. That no lease issued under authority of this act shall be assigned or sublet except with the consent of the Secretary of the Interior. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property, and for the safety and welfare of the miners and for the prevention of undue waste, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions securing the workers complete freedom of purchase, requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to secure fair and just weighing or measurement of the coal mined by each miner, and such other provisions as are needed for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare.

SEC. 13. That the possession of any lessee of the land or coal deposits leased under this act for all purposes involving adverse claims to the leased property shall be deemed the possession of the United States, and for such purposes the lessee shall occupy the same relation to the property leased as if operated directly by the United States.

SEC. 14. That any such lease may be forfeited and canceled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease or of general regulations promulgated under this act; and the lease may provide for the enforcement of other appropriate remedies for breach of specified conditions thereof.

SEC. 15. That on and after the approval of this act no lands in Alaska containing deposits of coal withdrawn from entry or sale shall be disposed of or acquired in any manner except as provided in this act: *Provided*, That the passage of this act shall not affect any proceeding now pending in the Department of the Interior, and any such proceeding may be carried to a final determination in said department, notwithstanding the passage hereof: *Provided further*, That no lease shall be made, under the provisions hereof, of any land, a claim for which is pending in the Department of the Interior at the date of the passage of this act, until and unless such claim is finally disposed of by the department adversely to the claimant.

SEC. 16. That all statements, representations, or reports required, unless otherwise specified, by the Secretary of the Interior under this act shall be upon oath and in such form and upon such blanks as the Secretary of the Interior may require, and any person making false oath, representation, or report shall be subject to punishment as for perjury.

SEC. 17. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act.

SEC. 18. That all acts and parts of acts in conflict herewith are hereby repealed.

COAL LANDS RESERVED.

The President of the United States is required by section 2 of the leasing act to "designate and reserve from use, location, sale, lease, or disposition, not exceeding 5,120 acres of coal-bearing land in the Bering River field, and not exceeding 7,680 acres of coal-bearing land in the Matanuska field," before opening the fields under the provisions of the act. The unreserved coal lands are thereafter to be "divided by the Secretary of the Interior into leasing blocks or tracts of 40 acres each or multiples thereof, and in such form as, in the opinion of the Secretary, will permit the most economical mining of the coal in such blocks, but in no case exceeding 2,560 acres in any one leasing block or tract." The lands having been thus divided into leasing blocks, the Secretary under the act is authorized, then and not before, to offer such blocks or tracts for leasing and award leases thereof through such plan as he may adopt, either by advertisement, competitive bidding, or otherwise.

It is recognized that if the Government were to reserve the total acreage allowed by law and were to select those areas that are believed to be best suited for profitable mining, the result might be to prevent effectually coal mining in Alaska until such time as the Government itself might undertake mine development and operation. The intention of Congress in passing the Alaska coal-leasing law is believed to have been the promotion of the mining of coal in the Territory as early as possible to meet the demands of the Government railroad, the Navy, and Alaskan consumers. The legal provision for Government reservation furnishes a means for safeguarding the public interest in the future, when lack of competition or other exigency may necessitate Government operation. The tracts now selected for reservation in accord with this policy are therefore such as are believed to possess the average rather than the highest value.

The President has therefore designated and reserved from use, location, sale, lease, or disposition the lands described as follows:

Lands reserved in Matanuska field, Seward base and meridian.

- (1) T. 19 N., R. 6 E.: N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ sec. 4;
NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ sec. 5.
T. 20 N., R. 6 E.: Lot 6 and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ sec. 31;
Lots 4, 5, 6, and 7 and SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ sec. 32;
Lots 3, 4, 5, and 6, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ sec. 33, containing
1,446.17 acres.

- (2) T. 20 N., R. 5 E.: NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, E. $\frac{1}{4}$ NW. $\frac{1}{4}$ and E. $\frac{1}{4}$ SW. $\frac{1}{4}$ sec. 20;
NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ and S. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 21;
SW. $\frac{1}{4}$ and S. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 22;
NW. $\frac{1}{4}$ sec. 27;
NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ sec. 28;
E. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 29, containing 1,880 acres.

Lands reserved in Bering River field, Copper River base and meridian.

- (3) T. 16 S., R. 8 E.: Secs. 23 and 24, containing 1,280 acres.
(4) T. 16 S., R. 8 E.: NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, sec. 33.
T. 17 S., R. 8 E.: N. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 3;
All of sec. 4;
E. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 5;
E. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 8;
N. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 9, containing 1,520 acres.
(5) T. 17 S., R. 7 E.: Lot 3 and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 8;
Lots 1 and 2, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ and W. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 9;
NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 16;
SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and W. $\frac{1}{4}$ SW. $\frac{1}{4}$ sec. 17;
NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lots 3 and 4 sec. 18,
containing 1,556.98 acres.

All of the coal land in the remainder of these fields is open to application for lease, and none of this open territory will be withdrawn or reserved while there is any bona fide application for a lease thereon.

UNRESERVED LANDS.

As noted in the foregoing statement the *unreserved* lands in the coal fields must be divided by the Secretary into leasing "blocks" or "tracts," before he can make a leasing offer. A survey of said lands in accordance with the system of public-land surveys is therefore necessary, as the act requires each leasing block or tract to be described by subdivisions of the survey. To this end such a survey of the Bering River and Matanuska fields has been made and the known coal lands in those fields divided into leasing blocks, as shown on the maps of those fields (in pocket).^a

GENERAL REGULATIONS.

(1) By authority of the act of Congress approved October 20, 1914 (38 Stat., 741), the unreserved surveyed coal lands in the Bering River and the Matanuska coal fields, Alaska, have been divided into leasing blocks, or tracts, of 40 acres, or multiples thereof, and leases of such blocks or tracts, with the privilege of mining and disposing of the coal, lignite, and associated minerals therein may be procured from the United States in the following manner:

(2) On request addressed to the Commissioner of the General Land Office at Washington, D. C., a blank application and lease will be furnished the applicant; also, those who desire may procure from the Superintendent of Documents, Government Printing Office, Washington, D. C., a folio containing photolithographic copies of the approved plats of the topographic and subdivisional township surveys of the Matanuska field (13 townships) for \$1, and of the Bering River field (8 townships) for 75 cents.

(3) From and after June 1, 1916, until August 1, 1916,^b applications for coal-mining leases will be received at the General Land Office from duly qualified applicants.

^a Maps not included in this circular; they are included in separate circular on leasing regulations.

^b As amended June 13, 1916.

Under this act the qualifications of such lessees are defined as follows:

(a) Any person above the age of 21 who is a citizen of the United States;

(b) Any association of such persons (that is, citizens of the United States over 21 years of age);

(c) Any corporation or municipality organized under the laws of the United States, or of any State or Territory thereof, "*Provided*, That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States."

(4) The total area that may be embraced in one lease is fixed at 2,560 acres, which may include one or more contiguous leasing blocks, or tracts, as shown on the map; and no person, association, or corporation is permitted to take or hold any interest as a stockholder or otherwise in more than one lease under this act.

(5) The application blank calls for information as to the name of the applicant, a description of the leasing block or blocks desired, amount of capital proposed as an investment under the lease, time when actual development under the lease will begin, experience in coal mining, and reference as to financial standing.

(6) The statute under which these proceedings are authorized provides that the Secretary of the Interior may award leases "through advertisement, competitive bidding, or such other methods as he may by general regulation adopt," and the purpose of the applications required herein is to procure such information as will best enable the Secretary to award leases so as to procure the best terms on behalf of the United States, and the most effective development of the coal deposits of the Territory.

(7) When the time fixed for filing such applications shall have expired, all applications then on file will be promptly listed and the proposed terms thereunder will be noted. Thereafter due publication, at the expense of the Government, for a period of 30 days will follow in at least three of the leading trade journals, one each at New York, Pittsburgh, and Chicago, and for the same period of time in three newspapers of general circulation, one each at San Francisco, Seattle, and Juneau, of the applications filed, each to be designated by a number and not by the name of the applicant, the blocks or block applied for, with the announcement that at the expiration of the period of publication the said applications will be taken up and the proposals therein considered, subject to any better terms that may be offered by any other qualified applicant during the period of publication, or by the first applicant.

(8) All applications for a lease, or proposals in connection therewith, pending at the expiration of the period of publication will be submitted to the Secretary of the Interior in one report, with specific recommendations as to the awards that should be made or denied under the several applications or proposals; and thereafter such action will be taken by the Secretary on the report as may in his discretion seem warranted on the showing made in each case, by which he will obtain the largest investment proportionate to the acreage of the lease, and the earliest actual development of the coal mine on a commercial basis, reserving the right to modify proposed leasing blocks, or tracts, if the economical mining of the coal will

better be procured thereby, or finally to reject any or all applications if, in his judgment, the interests of the United States so require.

(9) An actual beneficial expenditure on the ground for mining development and improvement purposes of \$100 for each acre included within the lease for which application is made will be adopted as the minimum basis upon which the proposed investments of the several applicants will be considered and adjudged, with the requirement that not less than one-fifth of the proposed investment shall be expended in the development of the mine during the first year, and a like sum each succeeding year, for the period of four years following the execution of the lease; excess investments in any year over such proportionate amount to be credited on the expenditure called for in the year ensuing. A bond, to be executed within 10 days after the signature of the lease, in the sum of one-half the amount to be expended each year will be required of each lessee conditioned upon the expenditure of such sum within said period.

(10) The procedure prescribed in the foregoing is to procure the orderly consideration of all applications or proposals that may be submitted in accordance with the foregoing regulations and within the period of time therein fixed; but when final action shall have been taken by the department upon the applications or proposals thus submitted any qualified applicant may thereafter apply for a leasing block or tract, and his application will be received and disposed of in the same manner and after like publication as herein provided.

(11) Lands found to contain coal but not divided into leasing blocks may be hereafter divided into such blocks, and the lands therein made the subject of a leasing offer, the rights of adjacent lessees to be given due consideration in any award that may be made under such offer.

PROSPECTING.

The coal-leasing act makes no provision for the right of an intending lessee to enter upon and explore coal fields embraced within a lease offer prior to submission of his application for a lease.

Such a right, if existent, would by implication carry with it some protection from the interference of others while engaged in such inspection as well as the exclusive benefit of any discoveries made thereby and amount in effect to a preference right based upon discovery; otherwise the right of exploration would be an empty privilege.

The entire scheme of section 3 of the act which governs the manner in which leases shall be awarded goes upon the theory that the Government is to offer "known" coal lands for leasing without priority of right recognized in either discovery, "opening a mine," or application, and "awarding leases thereof through advertisement, competitive bidding, or such other methods as he (the Secretary of the Interior) may by general regulations adopt."

All prospective applicants, however, will be accorded every opportunity to enter upon, inspect, and explore these coal fields at their pleasure in so far as such action may be necessary to acquire a thorough knowledge of field conditions, but no possessory or other right, either as against other prospectors or applicants or the United States, shall be acquired thereby.

USE OF TIMBER.

The use of timber by the lessee, in addition to that taken from the leasehold under the terms of the lease, may be secured by him from other lands not embraced in leasing units in accordance with the regulations that may be prescribed by the Secretary of the Interior under the act of May 14, 1898 (30 Stat., 414), and the acts amendatory thereof; or by arrangement with the Department of Agriculture, if from a national forest.

LEASES AND PERMITS AND APPLICATIONS THEREFOR.

COAL-MINING LEASE.

Data. THIS INDENTURE OF LEASE, entered into, in quintuplicate, this _____ day of _____, A. D., 19____, by and between the United States of America, acting in this behalf by _____

Parties. _____, Secretary of the Interior, party of the first part, hereinafter called the lessor, and _____ party of the second part, hereinafter called the lessee, under and pursuant to the act of Congress, approved October 20, 1914 (38 Stat., 741), entitled "An act to provide for the leasing of coal lands in the Territory of Alaska, and for other purposes," hereinafter called the "coal leasing act,"

WITNESSETH.

Purposes. That the lessor, in consideration of the rents and royalties to be paid and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee, for the period of fifty years from the date hereof, the exclusive right and privilege to mine and dispose of all the coal and associated minerals in, upon or under the following described tracts of land, situated in the Territory of Alaska, to wit: _____

Description of land. containing _____ acres, more or less, together with the right to construct coke ovens, briquetting plants, by-products plants, and all such other works as may be necessary and convenient for the mining and preparation of coal and associated minerals for market, the manufacture of coke or other products of coal, and to use so much of the surface and the sand, stone, timber and water thereon as may reasonably be required in the exercise of the rights and privileges herein granted, the use of such timber to be subject to such regulations as may be prescribed by the Secretary of the Interior under the act approved May 14, 1898 (30 Stat., 414), and the acts amendatory thereof.

Mining and surface rights.

ARTICLE I.

SECTION 1. The lessor expressly reserves unto itself the right to grant or use such easements in, over, through or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes; also the right to use, lease, or dispose of so much of the surface of the said lands as may not be actually needed, or occupied by the lessee in the conduct of mining operations. ^{Rights reserved by lessor.}

ARTICLE II.

It is expressly understood and agreed, that this lease is granted subject in all respects to the conditions, limitations, penalties and provisions contained in the "Coal Leasing Act," which act is hereby made a part hereof to the same extent as if incorporated herein. ^{Lease subject to "Coal Leasing Act."}

ARTICLE III.

It is further expressly understood and agreed that the mining rights and privileges leased as aforesaid shall extend to and include only coal and associated minerals, as hereinafter defined, and that no rights or privileges respecting any other kind or character of mineral, or mineral substance whatsoever, are granted or intended to be granted by this lease. ^{Mining rights limited to coal and associated minerals.}

ARTICLE IV.

The lessee in consideration of the lease of the rights and privileges aforesaid hereby covenants and agrees as follows:

SECTION 1. To invest in actual mining operations upon the leasing block included herein, the sum of ----- ^{Investment.}

----- dollars, of which sum not less than one-fifth shall be so expended during the first year succeeding the execution of this instrument, and a like sum each succeeding year for the period of four years; to furnish a bond, within 10 days after signature of the lease, in the sum of one-half the amount to be expended each year, conditioned upon the expenditure of such sum within said period, and submit annually, at the expiration of each year for the said period, an itemized statement, as to the amount and character of the expenditure during said year.

SEC. 2. To pay as an annual rental for each acre or part thereof covered by this lease, the sum of 25 cents per acre for the first year, payment of which amount is hereby acknowledged, the sum of 50 cents per acre per year for the second, third, fourth, and fifth years, and \$1 per acre for the sixth and each succeeding year during ^{Annual rental.}

the life of this lease, all such annual payments of rental to be made on the anniversary of the date hereof, and to be credited on the first royalties to become due hereunder during the year for which said rental was paid.

Royalty.

SEC. 3. To pay a royalty of 2 cents on every ton of 2,000 pounds of coal shipped or removed from the leased lands or manufactured into coke, briquets or other products of coal, or consumed on the premises, during the first five years succeeding the execution of this lease, and 5 cents per ton for the next 20 years. Royalties shall be payable at the end of each calendar month next succeeding that of the said shipment, removal, donation, manufacture or consumption.

Lessee to keep record of all coal shipped.

SEC. 4. To accurately weigh all coal shipped or removed from the leased premises, sold, or donated to local trade, manufactured into coke, briquets, or other products of coal, or otherwise consumed or utilized, and to accurately enter the weight or weights thereof in due form in books to be kept and preserved by the lessee for such purpose; together with the car numbers, if any, of the coal shipped by rail.

Reports to be furnished monthly by lessee.

SEC. 5. To furnish in manner and form and at such time during each calendar month as the lessor shall prescribe, but in no event later than the last day thereof, the following written reports covering the month immediately preceding, certified under oath by the superintendent at the mine, or by such other agent on the property having personal knowledge of the facts as may be designated by the lessee for such purpose, to wit:

A report copied from the books required to be kept at the mine under section 4 of this article showing the facts required to be entered therein; a report of the number of mine cars of mine-run coal hoisted or trammed from each coal bed of each separate mine; a report showing the quantity, size, and character of coal shipped, used for power purposes and lease consumption; donated to employees, manufactured into coke, briquets, or other products or by-products of coal; in storage on the premises, with the quantity of coal of various sizes added thereto and taken therefrom during the month.

ARTICLE V.

Periods for re-adjustment of royalty.

It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder at the end of 25 years from the date hereof, and at the end of 15 years thereafter, and thereafter at the end of each succeeding 10-year period during the continuance of this lease: *Provided*, That in any such readjustment the royalty fixed shall not exceed 5 per cent of the average selling price of coal of like character at the mine, per ton of 2,000 pounds in the coal field embracing the tracts covered by this lease, as shown by the books of the lessees operating in said field during a period of five years next preceding such readjustment.

ARTICLE VI.

This lease is made subject to the following provisions, which the lessee accepts and covenants faithfully to perform and observe:

SECTION 1. The lessee shall diligently proceed to prospect for, develop, and mine the coal in or upon the leased lands; shall carry on all mining operations in a good and workmanlike manner, having due regard to the health and safety of miners and other employees; and shall leave no available coal abandoned which could be recovered by the most approved methods of mining when in the regular course of mining operations the time shall arrive for mining such coal. No mine, entry, level, or group of rooms or workings shall be permanently abandoned and rendered inaccessible, save with the approval of the authorized representative of the lessor.

Mining operations to be energetically prosecuted.

Workings not to be abandoned until examination made.

SEC. 2. And also shall develop and mine the coal in the leased lands in accordance with a system to be shown by a preliminary plan on a scale of not more than 200 feet to the inch and a written description thereof, which plan and description shall be submitted for approval by the authorized representative of the lessor.

Preliminary plan of mining to be submitted in advance of operations on a commercial scale.

SEC. 3. And also where more than one bed of coal is known to exist in the leased lands, shall not draw or remove the pillars in any lower bed, before the available coal in any or all upper beds has been mined, unless it shall be decided by the authorized representative of the lessor that the workings in any or all of the upper beds will not be seriously injured by the extraction of the pillar coal in the lower workings. Where mining operations are being carried on in a bed that lies either below or above another bed in which mining has been or is being carried on and in which the pillars have not been pulled, and where the vertical distance between the two beds is less than fifteen times the thickness of the lower of the two beds, the lessee shall, as far as practicable, so arrange the pillars that those in the lower bed shall be vertically beneath those in the upper bed. Where practicable, by reason of either commercial or mining conditions, the available coal in the upper beds shall be exhausted before the coal in the lower beds is mined.

Where two or more beds of coal pillars in lower beds to be left until coal in upper beds extracted. Exceptions.

Pillars in lower beds to be arranged vertically under pillars in upper beds.

SEC. 4. And also shall not, without the consent in writing of the authorized representative of the lessor first had and obtained, mine any coal, or drive any underground working, or drill any lateral bore hole within 50 feet of any of the outside boundary lines of the leased lands, nor within such greater distance of such boundary lines, as the said representative shall prescribe for the protection of the property or the safeguarding of mining operations hereunder; but in the event the coal up to the like barrier in adjoining premises shall have been worked out and exhausted, and the water therein shall have been lowered below the working level of the opera-

Fifty-foot barrier pillars.

Lessee may be required to mine barrier pillars on adjacent lands.

tions on the same bed on the lands covered by the lease, the lessee hereunder hereby agrees, upon the written demand of said representative, to mine out and remove all the available coal in such barriers, both in the lands covered by this lease and on the adjoining premises, whenever same can be mined without hardship to the lessee and where the coal-mining rights in such adjoining premises are owned by the lessor.

Limitations of coal to be recovered in advance workings under "room-and-pillar" system.

SEC. 5. And also where the "room-and-pillar," or any other system of mining is followed which requires advance workings in the solid coal, including entries, breakthroughs, and rooms, instead of a system of mining under which all the coal is mined out and extracted as the work advances, shall not, without the consent in writing of the lessor being first had and obtained, mine and remove from such advance workings more than the following maximum percentages of the coal area for the specified depths of cover, viz:

Not more than 70 per cent where the cover is 100 feet or over but less than 200 feet in depth; not more than 65 per cent where the cover is 200 feet or over but less than 300 feet in depth; not more than 60 per cent where the cover is 300 feet or over but less than 400 feet in depth; not more than 55 per cent where the cover is 400 feet or over but less than 500 feet in depth; not more than 50 per cent where the cover is 500 feet or over but less than 750 feet in depth; not more than 45 per cent where the cover is 750 feet or over but less than 1,000 feet in depth; not more than 40 per cent where the cover is 1,000 feet or over but less than 1,250 feet in depth; not more than 35 per cent where the cover is 1,250 feet or over but less than 1,500 feet in depth; not more than 30 per cent where the cover is 1,500 feet or over but less than 1,750 feet in depth; not more than 25 per cent where the cover is 1,750 feet or over but less than 2,000 feet in depth; not more than 20 per cent where the cover is 2,000 feet or over.

Definition of term "percentage of area."

The said coal areas shall mean an area parallel with the dip or raise of the coal bed. The percentages of coal areas specified shall mean the percentages of coal to be mined in the areas comprised in the advance workings as compared with the percentages of coal to be left standing in such workings, and shall not be construed to mean the percentage of the total amount of coal in any such area of any such bed, where such bed in such area is thicker than the height of any such workings, nor shall such percentages of areas be held to include the coal extracted from the pillars in any such area, panel, or district of the mine, as it is the intent of the parties hereto that save as otherwise provided in this lease, and except where the retention of pillars shall be necessary for the maintenance of main roads or passageways or for the protection of the property, all such pillars shall be mined and removed as rapidly as proper mining will permit.

Pillars to be removed as rapidly as possible.

Exceptions.

SEC. 6. And also shall not, save as hereinafter authorized, light, keep, or maintain any fire in any mine or stripping, except as approved by the authorized representative of the lessor, or underground in any mine, or in contact with the coal in place or in or along the outcrop of any coal bed. Failure to take prompt and vigorous steps for the extinguishment of any such fire shall be sufficient ground for the entry of the lessor and the cancellation of this lease.

Fires in mine prohibited.

SEC. 7. And also shall promptly notify the authorized representative of the lessor of the discovery of any valuable mineral or mineral substance other than coal in the course of mining operations hereunder, and shall not mine or remove same unless the same is an associated mineral as hereinafter defined: *Provided*, That such quantities of fire clay, shale, or gas from the coal measures as may be required by the lessee in the conduct of operations hereunder may be removed and used without such written permission and without payment of royalty therefor. The lessee shall keep careful and accurate record in manner and form as may be prescribed by the lessor of all such associated minerals mined, used, or carried away, and shall pay such rates of royalty thereon as may be fixed by the said lessor, except as above provided.

Discovery of valuable mineral substance other than coal to be reported.

Lessee to have free use of fire clay and natural gas for lease purposes.

Record of associated minerals mined to be kept.

SEC. 8. And also shall keep at the mine office clear, accurate, and detailed maps on a scale of 100 feet to the inch, in the form of a horizontal projection on tracing cloth, of the workings in each coal bed in each separate mine on the leased lands, a separate map to be made for each such bed, and for the surface immediately over the underground workings, and to be so arranged with reference to a public land corner that the maps can be readily superimposed.

Mine map required to be kept at the mine office.

Each map of the workings in any coal bed shall show the location of all openings connecting such bed with the workings in any other bed, or with any adjacent mine, or with the surface; the location of all entries, gangways, rooms, or breasts, and any other narrow or wide workings, including the outlines of abandoned workings, and record of whether accessible or inaccessible; also barrier pillars, refuge chambers, stoppings, ventilating doors, overcasts, undercasts, regulators, and direction of air currents at the time of making map; location of stationary haulage and hoisting engines; permanent electrical generators, dynamos, and transformers; indications of trolley roads throughout their extent; also fire walls, sumps, and large bodies of standing water; position of main pumps and fire pipe lines; there shall also be marked on such maps the elevations above or below sea level or approved datum at points not over 200 feet apart horizontally, or over 100 feet apart vertically, in all main slopes, entries, levels, or headings, together with the thickness of coal beds at such intervals, and the elevations at the tops and bottoms of all shafts, slopes, and inclines.

Things required to be shown on detailed map of workings.

Requirements
for map of surface
over working.

The map of the surface immediately over the mine workings shall show all prominent topographic features and culture, section and township lines, the elevations above sea level or an approved datum, and contours at vertical intervals of 25 feet of such topographic features. Such map, together with the maps of the underground workings, shall be brought up to date not less than once in every six months.

Things re-
quired to be
shown on general
property map to
be kept at mine
office.

The lessee shall also make and keep at the mine office, at such time after the commencement of mining operations as the authorized representative of the lessor may direct, a clear and accurate general map of the entire leased lands, on a scale of 400 feet to the inch. Such map shall show all prominent topographical features and culture; the location of the surface areas immediately over the mine workings shown on the detailed surface map hereinbefore required; township, section, and property lines; the location of high-water marks; the outline of coal outcrops where known; the outlines of the chief mine workings, indicating the workings in each separate coal bed by distinguishing marks and the elevations above sea level or an approved datum, and contours at vertical intervals of 25 feet of the chief topographic features. Such map shall be brought up to date not less than once in every six months.

Prints of maps
to be furnished
lessor.

Blue prints or reproductions in duplicate of the maps required as aforesaid shall be furnished the authorized representative of the lessor when made, and supplemental prints or reproductions in duplicate furnished on or before January 1 of each succeeding year, showing the extensions, additions, and changes since the last map or supplement was submitted. All mine progress maps kept by the lessee shall at all times be subject to examination by said representative.

Abandoned
areas to be sur-
veyed and
mapped.

The lessee whenever any mine, or any workings therein are to be abandoned or indefinitely closed, and before same shall be abandoned or closed, or allowed to become inaccessible, shall make a survey thereof so as to accurately show the entire worked-out area or areas, and shall extend the results of such survey on the map or maps of the underground workings hereinbefore required, and promptly forward blue prints or reproductions thereof in duplicate to the said representative.

Maps may be
made at lessee's
expense in case
of failure to fur-
nish.

If the lessee shall fail to make or furnish any map or extension or revision as herein required within 90 days after demand therefor shall have been made by the authorized representative of the lessor, such representative may employ a competent engineer to make a survey of the mine, and plat the same as above provided, the expense thereof to be paid by the lessee, and in the event that the lessee shall fail to make such payment within 60 days after demand therefor by the authorized representative of the lessor, such failure shall constitute a cause of forfeiture of this lease.

SEC. 9. And also shall, where more than ten men are employed underground on any one shift in any separate mine, provide an escapeway or second exit to the surface, which shall be separated at the surface from the first exit by not less than 50 feet of strata in case of drift, slope, or tunnel workings, or in case of vertical shafts, or of inclined shafts having a pitch of more than 45°, by not less than 200 feet of strata. An escapeway or outlet through an adjoining mine shall be regarded as a satisfactory compliance with this requirement if kept at all time in proper condition for use. If such adjoining mine shall be abandoned at any time, or shall cease to operate indefinitely, the lessee hereunder shall be solely responsible for the cost and expense of maintaining such outlet, and in the event such outlet shall be abandoned or permitted to become unsafe for use, the number of men employed on any one shift shall be reduced below ten until such time as a second exit or escapeway shall be provided.

Second exit to surface to be provided, where more than 10 men employed on a shift.

Outlet through adjacent mine sufficient compliance.

SEC. 10. And also shall not employ more than five men underground on any one shift in any new working of any mine unless such new working shall be so connected with adjacent workings as to provide two distinct and separate means of escape from such new working: *Provided*, That with the approval of the authorized representative of the lessor, not exceeding ten men may be so employed in advance of the making of such second opening, but in no case shall any rooms, drifts, or slopes be opened or worked until such second opening is constructed.

Not more than five men to be employed in new workings unless second opening provided.

Exceptions.

SEC. 11. And also shall not construct or maintain any structure of inflammable material within 75 feet of any mine opening; nor within said distance permit any structure of noninflammable material to be connected to any other structure by means of any structure or erection of inflammable material, or to be connected to any structure beyond said distance which shall be constructed of inflammable material, except as follows, that is to say:

No building of inflammable material to be constructed within 75 feet of any mine.

(a) An open timber framework or headframe of timber may be constructed over a shaft, slope, or incline.

Exceptions.

(b) The posts, studs, and rafters of any such structure may be of wood if the covering or lining is made of non-inflammable material, but under no circumstances shall wood flooring be used, except in tipple and trestle structures.

SEC. 12. And also, except in a prospect opening, shall separate the main intake and return airways and all workings parallel to such airways by not less than 50 feet of strata except for break-throughs or crosscuts for ventilation or haulage, and shall provide for such greater distance between such airways or between any such airway and parallel workings as may be required in the judgment of the authorized representative of the

Main intake and return airways to be separated by not less than 50 feet of natural strata.

Pillars to be left standing until prior to final abandonment of mine.

lessor. The lessee agrees that the pillars thus provided for shall be left standing until in the proper course of mining operations the time shall arrive for their removal immediately prior to the final abandonment of the workings in that particular coal bed.

Ventilating fan to be provided where more than 10 men employed on shift.

SEC. 13. And also shall whenever more than ten men are employed underground on any one shift provide a fan or other mechanical means for circulating such amount of ventilating current as may be required by any law of the United States or of the Territory of Alaska now or hereafter enacted, or by the rules and regulations prescribed by the lessor, such fan or other mechanical means and the connection between same and the point of the entrance of the air current into the mine to be made of noncombustible material; and the lessee shall not set same in line with the axis of any mine opening, but shall place same at a distance of not less than 15 feet from the projection of the nearest side of such opening, and shall provide explosion doors of the full area of the air shaft or airway, in direct line with any and all such mine openings in order to protect said fan or other mechanical means of air circulation in case of a mine explosion: *Provided*, That during such time as the mine is being opened up and less than ten men are employed under ground on any one shift, and with the written approval of the authorized representative of the lessor, a furnace may be used for ventilation in a nongaseous mine if the fire box thereof is inclosed by brick, rock, or concrete walls, and a passageway around such inclosure at least two feet in width provided: *And provided further*, That if a wooden stack is used in connection with such furnace the lessee shall not permit such stack to be in contact with any coal bed or with any inflammable shale.

Fan not to be placed in direct line with any mine entrance.

With written approval of lessor's representative furnace may be used for ventilation under specified conditions.

Slack and refuse to be disposed of so as not to become a public or private nuisance.

SEC. 14. And also shall make such provisions for the disposal of the waste, slack, and refuse of the mine that the same shall not be a nuisance, inconvenience, or obstruction to any right of way, stream, or other means of transportation or travel, or to any private or public lands, or embarrass the operation of any other mine on the leased lands, or on adjoining lands, or in any manner occasion private or public damage, nuisance, or inconvenience. All waste containing practically no coal shall be deposited separate and apart from waste containing coal and in accordance with the directions of the authorized representative of the lessor.

Abandoned workings to be covered or fenced.

SEC. 15. And also shall upon abandonment substantially fence, fill in, cover, or close all surface openings or workings where persons or animals are likely to be injured by falling therein, or endangered by accumulations of gas, except as the lessor shall otherwise direct; and shall maintain all such fencing or covering in a secure condition during the term hereof.

SEC. 16. And also expressly agrees that all mining and related operations shall be subject to the inspection of authorized representatives of the lessor, and that such representatives, with all proper and necessary assistants, may at all reasonable times enter into and upon the leased lands and survey and examine same and all surface and underground improvements, works, machinery, equipment, and operations, and further expressly agrees to furnish said representatives and assistants all necessary assistance, conveniences, and facilities in making any such survey and examination.

Operations subject to inspection of lessor's representatives.

Lessee to furnish all necessary assistance.

SEC. 17. And also shall permit any authorized representative of the lessor to examine all books and records pertaining to operations under this lease, and to make copies of and extracts from any or all of same, if desired. The information so derived to be held confidential.

Lessee to permit examination of books for purpose of checking royalty returns.

SEC. 18. And also shall permit the lessor, its lessees, or transferees to make and use upon or under the leased lands any workings necessary for freeing any other mine from water, causing as little damage or interference as possible to or with the mine or mining operations of the lessee hereunder. Any such use by a lessee or transferee shall be conditioned upon the payment to the lessee hereunder of the amount of actual damages sustained thereby and adequate compensation for such use.

Lands leased and easements therein may be used for purposes of rendering operations on adjoining lands more safe; such use to be compensated for.

SEC. 19. And also shall accurately weigh or measure in the car and truly account for the coal mined and loaded by each miner, where the miners are paid either by the weight of their output or upon the basis of the measurement of the coal in the car; keep a correct record of all coal so weighed or measured; post or display such record daily for the inspection of the miners and other interested persons; and require the weighman or person appointed to measure the coal in the car where the miners are paid upon the basis thereof, before entering upon his duties, to make and subscribe to an oath before some person duly authorized to administer oaths that he will accurately weigh or measure and keep true record of the coal so weighed or measured and credit same to the miner entitled thereto, such affidavit to be kept conspicuously posted at the place of weighing, if any, but nothing contained herein shall be construed to prevent the lessee, in case rock and bone is loaded by the miner, from estimating or separately weighing, and deducting the amount thereof from the weights of coal accredited to such miner. The lessee hereby agrees that if a majority of the miners employed on the leased lands so desire they shall be permitted to employ at their own expense one of their fellow employees to see that the coal is properly weighed or measured and that a correct account of same is kept, and agrees to afford such person every facility to certify the weights and measurements while the weighing or measuring is being done: *Pro-*

Lessee to keep true and accurate weights or measurements of coal mined and loaded by miners.

Weighman to take oath for faithful discharge of duties

Miners to be permitted to employ check-weighman.

Checkweigh-
man to take oath
for faithful dis-
charge of his
duties.

vided, That the lessee shall not be required to so do unless such person, before entering upon his duties, shall make and subscribe to an oath before some person authorized to administer oaths that he will faithfully discharge the duties of his position, such oath to be kept conspicuously posted at the place of weighing, if any.

Wages to be
paid in lawful
money.

SEC. 20. And also shall pay all miners and other employees, both above and below ground, at least twice each month in lawful money of the United States, and shall permit such miners and other employees full and

Freedom of
purchase to be
allowed.

complete freedom of purchase, but with a view to increasing safety this provision shall not apply to the purchase of explosives, detonators or fuses, and shall not require or permit miners or other employees, except in case of emergency, to work underground for more than eight consecutive hours in any one calendar day, not including time for lunch or meals, or the time required to reach the usual working place.

Eight-hour
work day re-
quired.

Premises to be
surrendered in
proper condition
for continuance of
mining opera-
tions.

SEC. 21. And also shall, at the expiration or earlier termination of this lease, deliver up to the lessor the lands covered by this lease, together with all fixtures, improvements, and appurtenances, save as hereinafter provided, in such a secure and proper state that mining operations may be continued immediately to the full extent and capacity of such mine.

ARTICLE VII.

It is further mutually understood and agreed as follows:

Suspension of
operations for
more than three
months without
consent to be
cause of forfeit-
ure.

SECTION 1. That the suspension of mining operations by the lessee for a longer period than three months without the consent in writing of the lessor or its authorized representatives shall be cause of forfeiture of this lease.

Upon applica-
tion consent for
suspension for a
specified period
may be obtained.

If the lessee shall be unable to continue the operation of the mine for any cause, not due to the fault or negligence of the lessee, he shall be entitled to the suspension of operations for such a length of time, and upon payment of such minimum royalties, and such other conditions as may be specified in the order of suspension, but the issuance of any such order shall not excuse the payment of any rents or royalties due under this lease, or prevent forfeiture for failure to pay same, and the acceptance of any such rent or royalty shall not waive any other right of the lessor hereunder.

Lease not to be
assigned without
consent of lessor.

SEC. 2. That the lessee shall not assign this lease or any interest therein, nor sublet any portion of the leased premises, or any of the rights and privileges herein granted, without the written consent of the lessor being first had and obtained.

Breach of lease
covenants may be
waived in writ-
ing.

SEC. 3. That the lessor or its authorized representative may by notice in writing waive any breach of the covenants and conditions contained herein, except such as are required by the aforesaid "coal leasing act," but any such waiver shall extend only to the particular

breach so waived, and shall not limit the rights of the lessor with respect to any future breach. No waiver not in writing shall be in any way binding upon the lessor.

SEC. 4. That the lessee may terminate this lease at any time upon giving four months' notice in writing to the lessor or its authorized representative, and upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mine on the leased lands in accordance with the provisions of this lease: *Provided*, That in such case the right of valuation and purchase, accorded the lessor in the section next following (5), shall be exercised within said period of four months.

Lease may be terminated at any time upon payment of rents, etc.

Termination not to be effective until property examined.

SEC. 5. That at the expiration or earlier termination of this lease all tools, machinery, and equipment, including tracks, rails, and pipe placed by the lessee in the mine or on the property, shall before removal from normal position, if requested by the lessor or its authorized representatives, be valued by three disinterested and competent persons to be chosen in the manner hereinafter provided for the appointment of arbitrators, the valuation of these three or of a majority of them to be conclusive of the value of any or all of the said property; and the lessor or its agent, licensee, or lessee shall have the right to purchase within four months thereafter any or all such tools, machinery, equipment, or materials at the said valuation, deducting therefrom all rents, royalties, or other payments at that time due and payable by the lessee. If such valuation shall not be requested or the purchase shall not be made within said time the lessee shall have the privilege of removing same from the premises within one year from the expiration or termination of this lease, provided all debts and moneys specified in section 4 of this article shall have been paid. The lessee shall not, and hereby covenants not to, remove any mine supports, timbers, or props in place. All buildings and improvements erected upon the leased lands shall become a part of the property, and machinery and equipment shall not be removed therefrom in such a way as to cause any permanent injury to such buildings or improvements.

Lessor to have privilege of valuing and purchasing equipment, etc., on termination of lease.

Lessee may remove same within year.

SEC. 6. That if the lessee shall make default in the performance or observance of any of the terms, covenants, and stipulations of this lease, and such default shall continue for 60 days after service of written notice thereof by the lessor or its authorized representatives, then all the rights and privileges of the lessee cease and determine, and the lessor may, by appropriate proceedings, have this lease forfeited and canceled in a court of competent jurisdiction.

Forfeiture of lease.

A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for

any other cause of forfeiture or for the same cause occurring at any other time.

Questions
which may be
submitted to ar-
bitration.

SEC. 7. That in case any dispute shall arise between the lessor and lessee as to any question of fact, or as to the reasonableness of any requirement made by the lessor under the provisions of this lease, in the matter of operation, methods, means, expenditures, use of easements, compensation for joint occupancy by another lessee of a portion of the leased premises, or such other questions as are not determined by express statutory provision, such questions or disputes shall be settled by arbitration in the manner provided for by this section, and the lessor and lessee hereby covenant and agree each with the other to promptly comply with and carry out the decision or award of each and every board of arbitration appointed under this section.

Manner of ap-
pointing arbitra-
tors.

Questions in dispute to be determined by arbitration hereunder shall be referred to a board of arbitration consisting of three competent persons, one of which persons shall be selected by the lessor or its authorized representative, and one by the lessee, and the third by the two thus selected: *Provided*, That the lessor and lessee may agree upon one sole arbitrator or upon the third arbitrator. The party desiring such arbitration shall give written notice of the same to the other party, stating therein definitely the point or points in dispute, and name the person selected by such party hereto within 20 days after receiving such notice to name an arbitrator; and in the event it does not do so, the party serving such notice may select the second arbitrator and the two thus named shall select the third arbitrator. The arbitrators thus chosen shall give to each of the parties hereto written notice of the time and place of hearing, which hearing shall not be more than 30 days thereafter, and at the time and place appointed shall proceed with the hearing unless for some good cause, of which the arbitrators or a majority of them shall be the judge, it shall be postponed until some later day or date within a reasonable time. Both parties hereto shall have full opportunity to be heard on any question thus submitted, and the written determination of the board of arbitration thus constituted or of any two members thereof or, in case of the failure of any two members to agree, then the determination of the third arbitrator shall be final and conclusive upon the parties in reference to the questions thus submitted. All such determinations shall be in writing, and a copy thereof shall be delivered to each of such parties.

Decision of
third arbitrator
to be final.

New board to
be chosen in
event of failure
of arbitrators first
selected to choose
a third.

It is further agreed that in the event of the failure of the lessor and lessee, or of the two arbitrators selected as aforesaid by the parties hereto, within 20 days from notice to them of their selection, to agree upon the third

arbitrator, then the Secretary of the Interior shall appoint such arbitrator.

The said third arbitrator shall receive not to exceed \$15 per day as full compensation for his services and for all expenses connected therewith, exclusive of transportation charges; but such compensation shall not be in excess of \$150 for any arbitration. The losing party to such arbitration shall be liable for the payment of such compensation and transportation expenses of such third arbitrator.

SEC. 8. That any notice in writing as to any matter mentioned in this lease, addressed to the lessee and left upon the premises with the superintendent, manager, clerk, or other person in charge of the mine or of the office, or, in the absence of any such person, posted on the door of the office, shall have the same force and effect as if served upon the lessee, and 15 days shall be considered a reasonable notice, unless a longer notice be herein provided for or be so provided in such notice.

ARTICLE VIII.

It is further expressly agreed and declared that the terms and phrases hereinafter mentioned shall have the meanings hereinafter assigned unless the context shall otherwise require, that is to say:

(a) The phrase "available coal" as used in this lease shall mean merchantable coal from any coal bed which, when reached in the prosecution of the lessee's operations hereunder, can be mined at a reasonable profit by the use of machinery and methods which at that time are modern and efficient.

(b) The term "mine" as used herein shall mean and include all underground workings now or hereafter opened or worked for the purpose of mining and removing coal and associated minerals, together with all buildings, machinery, and equipment, above and below ground, used in connection with such mining operations.

(c) The term "pit" or "open pit" shall mean and include stripping operations or any open-air workings.

(d) The term "coal" as used herein shall mean and include anthracite, semianthracite, semibituminous, bituminous, subbituminous, lignite, and graphitic coal, lignite, natural coke, and such bony coal as is suitable for use as a fuel.

(e) The term "associated minerals" as used herein shall mean and include fire clay, shale, sandstone, and the bedded materials of the coal measures, exclusive of gold-bearing or other metalliferous deposits.

(f) The term "lessee" as used herein shall mean and include the heirs, executors, administrators, successors, or assigns of the lessee hereinbefore specified.

ARTICLE IX.

It is further mutually covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

ARTICLE X.

It is also further agreed that no member of or delegate to Congress or resident commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States and sections 114, 115, 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat., 1109) relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,

By _____ [L. S.]

Secretary of the Interior.

Witnesses:

_____ [L. S.]

APPLICATION FOR COAL-MINING LEASE.

The undersigned, _____,
a resident of _____,
a _____,

(Native born or naturalized; if the latter, furnish certificate.)

citizen of the United States, over 21 years of age, hereby applies, under the provisions of the act of October 20, 1914 (38 Stat., 741), for a mining lease of the certain leasing blocks, or tracts, of coal lands, to wit: Block _____, embracing the following specified legal subdivisions _____

_____ aggregating _____ acres. If I secure said lease, I propose to invest not less than _____ dollars in active, productive mining operations conducted upon said lease; the active development will begin not later than _____. My experience in coal-mining operations is as follows: _____

I neither own nor hold any interest, either as a stockholder or other-

wise, in any lease under this act, or in any application for such a lease, save and except the application now made; and I hereby refer to -----

as to my financial standing.

If I am awarded a lease, I will supply a satisfactory bond as required in section 9 of the regulations.

My post-office address is -----

(Signed) -----

Subscribed and sworn to before me, a -----,

-----, on this ----- day of -----

[SEAL.] -----

COAL-MINING PERMIT.

REGULATIONS GOVERNING THE ISSUANCE OF PERMITS FOR THE FREE USE OF COAL IN THE UNRESERVED PUBLIC LANDS IN ALASKA.

Section 10 of the act of October 20, 1914 (Public 216), provides:

That in order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period not exceeding ten years, on such conditions not inconsistent with this act as in his opinion will safeguard the public interest without payment of royalty for the coal mined or for the land occupied: *Provided*, That the acquisition of holding of a lease under the preceding sections of this act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such license shall be no bar to the acquisition or holding of such a lease or interest therein.

Owing to there being no settlements or local industries in or adjacent to the Bering or Matanuska coal fields, and the contemplated leasing offer of coal lands in said fields, these regulations and the permits provided for shall not at present apply to coal deposits in those fields.

Qualifications.—Under the terms of the act, expressed in section 3 thereof, only citizens of the United States above the age of 21 years, associations of such citizens, corporations, and municipalities organized under the laws of the United States or of any State or Territory thereof, provided the majority of the stock of such corporations shall at all times be owned and held by citizens of the United States, are eligible to receive a permit to prospect for and mine coal from the unreserved public lands in Alaska.

Who may mine coal for sale.—All permittees may mine coal for sale except railroads and common carriers, who by the terms of section 3 of the act are restricted to the acquirement of only such an amount of coal as may be required and used for their own consumption.

Duration of permits.—Permits will be granted for two years, beginning at date of filing, if filed in person or by attorney, or date of mailing, if sent by registered letter, subject to the approval of the Commissioner of the General Land Office, and upon application and

satisfactory showing as to the necessity therefor, may be extended by the commissioner for a longer period, subject to such conditions necessary for the protection of the public interest as may be imposed prior to or at the time of the extension. Misrepresentation, carelessness, waste, injury to property, the charge of unreasonable prices for coal, or material violation of such rules and regulations governing operation as shall have been prescribed in advance of the issuance of a permit, will be deemed sufficient cause for revocation.

Limitation of area.—The act limits the area to be covered in any one permit to 10 acres. It is not to be inferred from this, however, that the permits granted thereunder shall necessarily cover that area. The ground covered by a permit must be square in form and should be limited to an area reasonably sufficient to supply the quantity of coal needed.

Scope of permit.—Permits issued under section 10 of the act of October 20, 1914, grant only a license to prospect for, mine, and remove coal free of charge from the unreserved public coal lands in Alaska, and do not authorize the mining of any other form of mineral deposit, nor the cutting or removal of timber.

How to proceed to obtain a permit.—The application should be duly executed on Form 4—020, and the same should either be transmitted by registered mail to, or filed in person with, the register and receiver of the United States land office of the district in which the land is situated. Prior to the execution of the application the applicant must have gone upon the land, plainly marked the boundaries thereof by substantial monuments, and posted a notice setting forth his intention of mining coal therefrom. The application must contain the statement that these requirements have been complied with and the description of the land as given in the application must correspond with the description as marked on the ground. The permit, if granted, should be recorded with the local mining district recorder, if the land is situated within an organized mining district.

When coal may be mined before issuance of a permit.—In view of the fact that by reason of long distances and limited means of transportation many applicants may be unable to appear in person at the United States land office to file their applications, it has been deemed advisable to allow such applicants the privilege of mining coal as soon as their applications have been duly executed and sent by registered mail to the proper United States land office. Should an application be rejected, upon receipt of notice thereof all privileges under this paragraph terminate and the applicant must cease mining the coal.

Action by register.—The register will keep a proper record of all applications received and all actions taken thereon in a book provided for that purpose. If there appear no reason why the application should not be allowed, the register will issue a permit on the form provided for that purpose. Should any objection appear either as to the qualifications of the applicant or applicants, or in the substance or sufficiency of the application, the register may reject the application or suspend it for correction or supplemental showing under the usual rules of procedure, subject to appeal to the Commissioner of the General Land Office. Upon the issuance of a permit the register will promptly forward to the Commissioner of the General Land Office, by special letter, the original application and a copy of the

permit, and transmit copies thereof to the Chief of the Alaskan Field Division, and to the local representatives of the United States Bureau of Mines, for their information.

NOTE.—These regulations are intended merely as a temporary arrangement to meet immediate necessities, as authorized by section 10 of the act of October 20, 1914, and are not to be construed as applying to the leasing of public coal lands in Alaska provided in other sections of the act.

APPLICATION FOR COAL-MINING PERMIT.

-----, 191
The Commissioner of the General Land Office,
Washington, D. C.

SIR: The undersigned, -----

(Name of applicant.)

of -----, hereby appl for a permit to
 (Post-office address.)

prospect for, mine, and remove coal from the following-described land:

(Describe the land by legal subdivision if surveyed, and by metes and bounds with reference to some permanent natural landmark if unsurveyed.)

containing approximately ----- acres, situated within the
 ----- land district, ----- miles of -----
 (Direction.)

Alaska, and in support of this application make the following representation as to qualifications to receive a permit: -----

(Citizenship of applicant or

applicants must here be shown. If the applicant is a municipality or corporation, it must

be shown under what laws it is organized; and if the latter, it must also be shown whether

a majority of its stock is owned and held by citizens of the United States.)

The applicant further represent that ----- ha not,
 (He, they, or it.)

within two years last past, applied for or received a permit to mine coal under the provisions of section 10 of the act of October 20, 1914, in the coal field in which the land described in this application is situated, -----

(State exceptions here, if any.)

and that the coal herein applied for is to be mined for the purpose of supplying the following demands, for which approximately ----- tons are required annually: -----

(Here itemize the various uses to which the coal is to be applied, stating the number of tons necessary for each use.)

It is further represented that the boundaries of the tract described in this application have been plainly marked by substantial monuments, and that a proper notice describing the land and showing the intention of the applicant to apply for a free permit to mine coal therefrom has been posted in a conspicuous place upon the land.

On consideration that a permit be granted, the applicants hereby agree :

1. To exercise reasonable diligence, precaution, and skill in the operation of the mine, with a view to the prevention of injury to workmen, waste of coal, damage to Government property, and to comply substantially with the instructions and the rules and regulations printed on the back of this application.

2. To charge only such prices for coal sold to others as represent a fair return for the labor expended and reasonable earning value to which the investment in the enterprise is entitled, without including any charge for the coal itself.

3. Not to mine or dispose of, either directly or indirectly, any coal from the area covered by said permit for export or any purpose other than "strictly local and domestic needs for fuel."

4. To leave the premises in good condition upon the termination of the permit, with all mine props and timbers in the mine intact, and with the underground workings free from refuse and in condition for continued mining operations.

Signature of applicant -----

The foregoing application was signed by -----

-----, the applicant therein, in the presence of the undersigned, who, at ----- request and in -----
(His or their.) (His or their.)
presence and in the presence of each other, have subscribed our names as witnesses to the execution thereof.

Dated this ----- day of -----, 19____, at -----
Territory of Alaska.

Name ----- Residence -----
Name ----- Residence -----

REGULATIONS CONSTRUED.

In paragraph 1 of the regulations governing free-coal mining permits under section 10 of the act of October 20, 1914 (38 Stat., 741), approved December 20, 1914, and now appearing at page 29 of the general regulations approved May 18, 1916, affecting coal lands in Alaska, the following statement occurs:

Owing to there being no settlements or local industries in or adjacent to the Bering or Matanuska coal fields, and the contemplated leasing offer of coal lands in said fields, these regulations and the permits provided for shall not at present apply to coal deposits in those fields.

In view of the fact that coal lands for leasing in Matanuska and Bering River fields have been surveyed into leasing blocks or tracts, I am of the opinion that hereafter the restriction in the regulations should be construed as applying only to those lands included in such leasing blocks or tracts.

THE NENANA FIELD.

A complete topographic and subdivisional township survey has been made of the Nenana field, and a folio containing photolithographic copies of the approved township plats of such surveys may be procured on application to the Superintendent of Documents, Washington, D. C., for \$1.

In view of the fact that it was impossible for any kind of practicable transportation facilities to reach this field during the season of 1915, the field has not been examined by the expert mining engineers and geologists of the Interior Department with the view to dividing it into leasing blocks. This work will be done during the summer of 1916, whereupon, as promptly as possible, opportunity will be given for leasing in the Nenana field in accordance with the regulations herein provided. In the meantime temporary free coal-mining permits will be allowed under section 10 of the leasing act, operations under such permits to be subject, however, to future leases, as it is not deemed advisable to allow operations under such permits to interfere with the larger and more permanent operations contemplated under lease.

The Government railroad from Seward to Fairbanks will pass through the Nenana coal field. From the fields to Fairbanks is 110 miles.

Respectfully,

CLAY TALLMAN,
Commissioner.

Approved, July 19, 1916.

FRANKLIN K. LANE, *Secretary.*

OSMUND M. JORSTAD.

Decided July 19, 1916.

SALE OF FIRE-KILLED TIMBER—PROCEEDS OF SALE.

The act of March 4, 1913, authorizing the Secretary of the Interior to sell any timber on public lands which has been killed or permanently damaged by forest fires, makes no provision for payment of the proceeds of such sales to persons who subsequently make entries of lands from which the timber has been so sold.

JONES, *First Assistant Secretary:*

Osmund M. Jorstad appealed from decision of March 2, 1916, denying payment of proceeds of sale of dead and burned timber on the land he subsequently entered and described as N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 29, T. 17 S., R. 29 E., T. M., Gainesville, Florida, on the ground that the Government had sold the timber under act of March 4, 1913 (37 Stat., 1015), prior to date of his entry.

August 31, 1915, the Department sold the burned and dead timber on above described land under act of March 4, 1913, *supra*, to the Hodges Lumber Company, of Americus, Georgia. October 2, 1915, more than a month after such sale, Jorstad made homestead entry for said land. February 13, 1916, Jorstad applied to the Commissioner of the General Land Office under said act of March 4, 1913, for payment of the proceeds of such timber sale to him, which the

Commissioner denied. The act of March 4, 1913, provides that the Secretary of the Interior shall sell to the highest bidder at public auction or through sealed bids, all the timber on any lands of the United States outside the national forests, that may have been killed or permanently damaged by forest fires prior to date of that act. The timber was sold under this act before Jorstad's entry.

There is no provision in the statute for payment of the proceeds of timber sales to one who subsequently enters the land. By the sale the timber is severed from the land and a subsequent entryman gets no claim to anything but the land itself on removal of the timber.

The decision is affirmed.

CEDED PORTION OF WIND RIVER RESERVATION—ACT OF JULY 3, 1916.

CIRCULAR.

[No. 489.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 21, 1916.

REGISTER AND RECEIVER,

United States Land Office, Lander, Wyoming.

SIRS: The act of July 3, 1916 (Public, No. 135), provides:

That any person, who, prior to the passage of this act, made homestead entry on the ceded portion of Wind River Reservation, in Wyoming, who has not abandoned the same, whose entry is still existent and of record, and who has been unable to secure water for the irrigation of the land covered by his entry, may secure title to the same upon the submission of satisfactory proof that he has established and maintained actual bona fide residence upon his land for a period of not less than eight months, and upon payment of all sums remaining due on said land, as provided for by the act of March 3, 1905.

Its provisions are identical with those of the act of April 27, 1912 (37 Stat., 91), and extend its benefits to persons whose entries were made after December 16, 1911, but prior to July 3, 1916. In proof under this act, submitted after the usual publication and posting of notice, there need not be evidence as to cultivation of the land, but the entryman must show residence thereon amounting to at least eight months and that he has been unable to secure water for irrigation thereof; these facts being shown, he is entitled to make payment for the land, as in case of commutation.

You will consider proofs under this act and accept them if satisfactory, issuing final certificates on payment of the money. On the

face of each certificate you will note: "Commuted Homestead—Act of July 3, 1916."

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

ROUMAGOUX v. ERICKSON.

Decided July 22, 1916.

AGREEMENT TO ACQUIRE TITLE FOR ANOTHER.

An agreement made before entry to acquire title under the nonmineral public land laws with a view to conveyance of such title to another when secured is fraudulent.

SOLDIERS' ADDITIONAL—OCCUPIED LAND.

Land occupied by one qualified to acquire title thereto under the public land laws is not subject to soldiers' additional entry.

OCCUPANCY OF PUBLIC LAND.

The mere occupancy of public land, without right under any statute to acquire title thereto, does not exclude it from appropriation by another under the public land laws.

JONES, *First Assistant Secretary:*

Robert Erickson appealed from decision of February 19, 1916, rejecting his application as assignee of a soldiers' additional right to make entry for lot 6, Sec. 15, and lot 4, Sec. 14, T. 15 S., R. 45 E., Vale, Oregon, land district, and allowing Arthur I. Roumagoux's desert land application for the same tracts.

The tract is a recently surveyed island in the Snake River. September 22, 1914, plat of survey was filed in the local office. September 15, 1914, Roumagoux filed desert land application alleging settlement April 1, 1913, residence ever since and valuable improvements. September 22, 1914, Erickson applied to enter as assignee of soldiers' additional rights. Hearing was ordered by the local office and held October 20, 1914. July 30, 1915, the local office found for Erickson, recommending dismissal of Roumagoux's application and allowance of Erickson's entry. The Commissioner reversed that action.

The facts are in narrow compass and not disputed. In 1913, one J. F. Hancock held possession of the island, and deeded it to Erickson, and by the same deed conveyed to Erickson deeded riparian lands on the Oregon side. March 17, 1914, a contract was made between Erickson of the first part, and George E. Mercer and Louise Roumagoux, wife of the present applicant. This contract in sub-

stance provided that Erickson should convey with warranty to Mercer and Louise Roumagoux, deeded lands described as S. $\frac{1}{2}$ SE. $\frac{1}{4}$, lots 3, 4, 5, Sec. 15, lot 1, Sec. 14, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, T. 15 S., R. 45 E., W. M., and also he conveyed to them Huffman's Island, all valued at \$5,000. The contract provided that Erickson was to retain legal title until he perfected desert land entry for Huffman Island, and furnished an abstract of his title. It was well understood at the time that Erickson had no title to Huffman Island, which was then unsurveyed.

In consideration of the above agreement Mercer and Louise Roumagoux by bill of sale conveyed to Erickson six work horses, three double sets of harness, seven wagons, one 6-horsepower gasoline "saw outfit," and a lease on certain lands where the "saw outfit" was located. This property was valued in the transaction at \$3,000, and the grantors agreed to execute a mortgage on the lands Erickson conveyed to them to secure a note of \$2,000 with 8% interest, payable on or before five years from date, and attorney fees in case of foreclosure. They assumed all taxes on the real estate for the year 1913, and subsequent thereto. The contract also provided that while possession was to be given mutually of the property so conveyed, the grantees Mercer and Louise Roumagoux were to be regarded as tenants of Erickson.

There are numerous assignments of error and they all amount in substance to a failure of the Commissioner of the General Land Office to recognize this contract and require its performance by Roumagoux, and to that end, in failing to accept Erickson's application for soldiers' additional entry and to reject Roumagoux's desert land application.

In view of the Department the Commissioner committed no error. An agreement made before entry to acquire title under the public land laws with view to conveyance of such title when secured to another person is essentially fraudulent. The act of August 30, 1890 (26 Stat., 371, 391), forbids the acquisition of title under any non-mineral land laws in a greater area than 320 acres. If a contract of this kind is enforceable, or is recognized in the land department, enforcement of this law would be practically impossible. It was held in *Herbert C. Oakley* (34 L. D., 383, 386), that—

The result of the recognition of such a right in the claimant is clearly manifest and the effect thereof might easily operate to nullify that provision of the act which declares that "no person or association of persons shall hold, by *assignment or otherwise*, prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert lands."

This had reference to the act of March 3, 1891 (26 Stat., 1095), and the two acts are similar and for a similar purpose. The decision last cited makes a contract of the kind that is admitted here fraudulent and invalid.

Land occupied by another is not subject to soldiers' additional entry. T. H. Bartlett (32 L. D., 374).

It appears, moreover, that since Erickson made this contract he has become disqualified to make a desert land entry by taking the assignment of another entry, thus exhausting his right. He has no right of desert land entry, and when he disqualified himself to make it the land became at once a part of the public domain subject to appropriation by any other person and he was incapable of completing his contract. One can not by a mere occupancy of public lands without right under any statute to acquire title thereto exclude another from such appropriation. *Wheeler v. Rodgers* (28 L. D., 250); *Hall v. Armann* (41 L. D., 430).

The decision is affirmed.

RECLAMATION—EXTENSION OF PAYMENTS—ACT JULY 26, 1916.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, July 26, 1916.

1. On July 26, 1916, the President approved an act [Public, No. 167], as follows:

AN ACT To amend section fourteen of the reclamation extension act approved August thirteenth, nineteen hundred and fourteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fourteen of an act entitled "An act extending the period of payment under reclamation projects, and for other purposes," approved August thirteenth, nineteen hundred and fourteen, be amended so as to read as follows:

"SEC. 14. That any person whose land or entry has heretofore become subject to the reclamation law, who desires to secure the benefits of the extension of the period of payments provided by this act, shall, within six months after the issuance of the first public notice hereunder affecting his land or entry, notify the Secretary of the Interior, in the manner to be prescribed by said Secretary of his acceptance of all the terms and conditions of this act, and thereafter his lands or entry shall be subject to all of the provisions of this act: *Provided*, That upon sufficient showing the Secretary of the Interior may, in his discretion, permit notice of acceptance of all the terms and conditions of this act to be filed at any time after the time limit hereinbefore fixed for filing such acceptance shall have expired, conditioned, however, that where the applicant for such acceptance is in arrears on construction charges, he shall at the time of acceptance pay such installments of the construction charge as he would have been required to pay had he accepted this act within the time limit hereinabove fixed, plus the penalties that would have accrued had he so accepted, and such applicant shall thereafter be upon the same status that he would have been had he accepted the provisions of this act within the time limit hereinabove fixed, and thereafter the lands or entry of any such persons so filing such notice of acceptance shall be subject to all the provisions of this act."

2. This amendment of the extension act provides a means whereby all who have failed or may hereafter fail to file an acceptance of the extension act within the six-month period may, upon proper showing, do so after expiration of that period and thus get the benefits of the extension of payments.

3. Such persons must file with the project manager their applications to accept, accompanied by executed acceptance of the extension act and a showing as to the reasons why they failed to accept within the six-month period after issuance of the first public notice under the extension act affecting their lands. The application must also be accompanied by the payments of charges required by the act. These charges will be carried in the reclamation deposit account until the application is acted upon and the executed acceptance is approved or rejected, and if approved will be covered into the reclamation fund and proper credit allowed to the person filing, and if rejected will be returned.

4. Upon receipt of such application, executed acceptance, and showing accompanied by the necessary payments, the project manager will immediately submit the matter with his report to the Washington office, where the application will be considered and the executed acceptance approved or rejected. The project manager and chief of construction will be immediately notified.

5. The act provides that where the applicant is in arrears on construction charges he shall pay such installments of the construction charges as he would have been required to pay had he accepted the act within the six-month period, plus the penalties that would have accrued had he so accepted, and such applicant shall be upon the same status that he would have been had he accepted within the six-month period.

6. Where the applicant is in arrears for any installments of the construction charge, he must accompany his application with such payments as not to leave unpaid any installment of the construction charge or penalty thereon, such installments and penalties to be calculated on the basis that they would have been had he accepted the extension act within the six-month period. For example, if an acceptance is now permitted in the case of a project where the statutory period of acceptance expired March 24, 1915, as in the case of most projects, there will be accrued against the applicant's land the installments of the construction charge computed under the terms of section 2 of the extension act which would have been due on December 1 of each year preceding the acceptance, beginning with the year 1914, as well as any supplemental construction charges which have become effective, allowing credit for any payment made on account thereof.

7. If the applicant has paid construction charges under the 10-year plan due on or after December 1, 1914, he will receive credit against the charges accrued under the extension act and will be required to pay at the time of filing acceptance under this act only those charges which are not balanced by such credits, together with the penalties for nonpayment provided for in the extension act. In other words, he is required by law to make such payments at the time of filing application as not to leave unpaid any installment of the construction charge or any penalty thereon. Any surplus of credit will be applied to operation and maintenance charges due and unpaid, and if there be any balance it shall be treated as an advance payment.

8. The project manager will reject any application for permission to accept which is not accompanied by full payment of the construction charge as herein provided, and inform the applicant that he may file with the project manager an appeal in writing within 30 days after notice of such decision, such appeal to be addressed to the Director of the Reclamation Service.

9. The obligation to pay operation and maintenance charges for the years preceding the application for acceptance under this act remains unchanged, but any acceptance allowed will place the applicant in the same position as if he had accepted within the time limited. He would therefore be permitted to take advantage of the public notice of March 16, 1916, and add to his unpaid construction charge any unpaid operation and maintenance charge which accrued and accumulated on or prior to December 1, 1914. Operation and maintenance charges which have accrued since December 1, 1914, will be treated in accordance with the public notices applicable.

10. Upon approval of the application the applicant will be in the same status as if he had accepted within the six-month period. The 20-year period of extended payments will not date from the date of the approval of the application but from the date which would have been applicable had he accepted within the six-month period; that is, all those whose applications under the amended act are approved will be in the same class as those who accepted within the six-month period, both as to time of extended payment and installments accrued, as well as any supplemental construction charges which have become effective.

W. A. RYAN, *Acting Director.*

Approved July 27, 1916:

ANDRIEUS A. JONES,

First Assistant Secretary.

**LEAVE OF ABSENCE TO HOMESTEAD SETTLERS ON UNSURVEYED
LANDS—ACT OF JULY 3, 1916.****CIRCULAR.**

[No. 492.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 27, 1916.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: The act of July 3, 1916 (Public, No. 136), provides as follows:

That any qualified person who has heretofore or shall hereafter in good faith make settlement upon and improve unsurveyed, unreserved, unappropriated public lands of the United States with intention, upon survey, of entering same under the homestead laws shall be entitled to a leave of absence in one or two periods not exceeding in the aggregate five months in each year after establishment of residence: *Provided*, That he shall have plainly marked on the ground the exterior boundaries of the lands claimed and have filed in the local land office notice of the approximate location of the lands settled upon and claimed, of the period of intended absence, and that he shall upon the termination of the absence and his return to the land file notice thereof in the local land office.

2. You will give the current serial numbers to notices filed under this act, and make due record of them on your serial number registers, plainly noting at the top of the page that no entry has been made. You will not make any note of such papers on your tract books, even though the description of the land be given therein by section, township, range, and legal subdivisions. The notices, both of leaving and of returning to the land, will be forwarded with your monthly returns. When a township plat of survey is filed in your office, you will be careful to assign to applications for entry of lands therein the same serial numbers which have been already given the notices of absences under this act.

3. A settler upon unsurveyed, unreserved, and unappropriated public land is entitled to one or two leaves of absence during each residence year, aggregating not more than five months in each year, after establishing of residence, in the same manner and upon the same conditions as persons having entries of record. If he has returned after an absence of less than five months and filed notice of his return, he may, without any intervening residence, again absent himself—pursuant to new notice—for the remaining part of five months within the residence year. However, two absences in different residence years, reckoned from the date when residence was established, must be separated by substantial periods if they together make up

more than five months. The notices will follow the forms appended to these instructions.

4. The act does not authorize the filing of a notice of a settlement claim except as included in a notice of absence from the land; unless the paper tendered shows the beginning or ending of an absence, you will decline to receive it.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

NOTICE OF BEGINNING OF ABSENCE FROM SETTLEMENT CLAIM (ACT OF
JULY 3, 1916—PUBLIC, NO. 136).

REGISTER AND RECEIVER,
United States Land Office.

SIRS: I, _____, of _____, have in good faith made settlement upon and improved a tract of unsurveyed, unreserved, unappropriated public land of the United States supposed to contain about _____ acres, with the intention of entering same under the homestead laws after it shall have been surveyed, and I have plainly marked on the ground the exterior boundaries of the land claimed by me. Its approximate location is as follows:_____

Having lived on the land since a date not later than the _____ day of _____, in the year _____, I count my residence-years as beginning on that calendar day.

I hereby give notice that I intend to be absent from said land for a period not exceeding five months, beginning _____, 19____. Upon my return to the land I will notify you to that effect.

(Signature of settler.)

NOTICE OF TERMINATION OF ABSENCE (REQUIRED BY ACT OF JULY 3, 1916,
PUBLIC, NO. 136).

REGISTER AND RECEIVER,
United States Land Office.

SIRS: I, _____, of _____, am the same person who filed notice of intention to absent myself from my settlement claim for an unsurveyed tract of land described approximately as follows:_____

I hereby give notice that I returned to the land above described on _____, 19____. My absence began on _____, 19____.

(Signature of settler.)

INDIAN OCCUPANTS OF RAILROAD LANDS—ACTS MARCH 4, 1913,
AND APRIL 11, 1916.

CIRCULAR.

[No. 510.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 11, 1916.

REGISTERS AND RECEIVERS,

*United States Land Offices in Arizona, California,
and New Mexico.*

1. Indian occupants of railroad lands who are entitled to the benefits of the act of March 4, 1913 (37 Stat., 1007), as extended by the act of April 11, 1916 (Public, No. 45), should file in the proper local land offices their applications for allotment in the usual manner. Each application must be accompanied by a showing to the effect that the Indian claiming the benefits of the act has occupied the land involved for the required period of five years or more. Said showing may consist of the affidavit of the applicant setting forth when the occupancy began, how long it continued, just what it consisted of, and such other pertinent facts as will enable the Department to determine the nature and extent of the alleged occupancy. This affidavit must be corroborated by at least two witnesses familiar with the facts. When such applications and showings are filed in the proper local offices, the registers and receivers will transmit them to this office, observing the instructions contained in circular No. 403 of April 24, 1915.

2. When an application and the accompanying showing reaches this office they will be examined, and if on their face they show that the Indian is qualified to make an allotment under existing law and has occupied the land applied for in accordance with the requirements of the said act, the railroad company will be requested to relinquish or reconvey the land. The company's deeds of reconveyance should not be recorded before they have been accepted by the Department. After the deeds have been accepted by the Department they will be returned to the company to be properly recorded in the counties in which the lands involved are situated. If the company relinquishes or reconveys the land the relinquishment or reconveyance will be held without action in this office until the company files its application to select other land in lieu of the land relinquished or reconveyed by it. If the lieu selection when made appears regular on its face, the Field Service will then be requested to make an investigation in the field with a view of ascertaining whether the Indian has occupied the land applied for by him for the required

period and is otherwise qualified to make an allotment of the land, and also whether the land applied for by the railroad company is of the character contemplated by the said act and that the two tracts are of equal value.

3. The report of the field officer when made will be considered by this office and suitable recommendations made to the Secretary. Should the Department decline to accept the relinquishment or reconveyance of the company, the Indian's allotment application and the company's application for lieu selection will be rejected in the usual manner, but if the Department accepts the relinquishment or reconveyance of the railroad company, proper notations thereof will be made upon the records of this and the local office after all formalities in such cases have been complied with, and thereafter the allotment application of the Indian and the company's application to select will receive consideration by this office with a view of their allowance and the issuance of patents if found regular and sufficient.

Very respectfully,

C. M. BRUCE,
Acting Commissioner.

Approved October 11, 1916:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

JOHN ARD.

Decided August 5, 1916.

REPAYMENT—ERRONEOUS ENTRY—CLERICAL ERROR.

Where by reason of a clerical error in the application a homestead entry was allowed for land not intended to be taken, and an application to amend the entry to embrace the land desired was rejected because of the fact that it was then embraced in another entry, the entryman, upon relinquishment of the erroneous entry, is entitled to repayment of the fees and commissions paid by him in connection with said entry.

JONES, *First Assistant Secretary:*

John Ard has appealed from the decision of May 12, 1916, denying repayment of moneys paid on his homestead entry for the NW. $\frac{1}{4}$, Sec. 32, and NE. $\frac{1}{4}$, Sec. 31, T. 27 N., R. 50 W., Lamar, Colorado, land district, which was canceled on his relinquishment.

Ard found that he had entered land six miles distant from, and entirely inferior to, that which he had selected. It is not shown whether this was through a clerical error in the local office or through a blunder of Ard himself. He applied to amend, but the land desired was then covered by another entry. When that entry was held intact and his application to amend was rejected, he applied for repayment

of fees and commissions, filing at the same time a relinquishment of the erroneous entry as an essential incident to the application for repayment.

It thus appearing that the land originally intended to be entered by Ard, and applied for by him in his effort to amend, was not subject to appropriation, and his application was for that reason rejected, it follows that he is entitled to relief under the provisions of the act of March 26, 1908 (35 Stat., 48). A clerical error or mistake in the original application can not be determinative of his rights under a remedial statute. Department decisions in the Gallas and Green cases (41 L. D., 63 and 65), cited by the Commissioner, will not be followed in cases of this kind.

The decision is accordingly reversed.

INSTRUCTIONS.

August 16, 1916.

ENLARGED HOMESTEAD—ENTRY UNDER SECTION 6—MILITARY SERVICE.

Credit for military service may be allowed, under section 2305, R. S., on entries under section 6 of the enlarged homestead acts of February 19, 1909, and June 17, 1910, upon compliance with the provision of said section requiring residence, cultivation, and improvement for the period of at least one year.

JONES, First Assistant Secretary:

Section 6 of the act of February 19, 1909 (35 Stat., 639), and section 6 of the act of June 17, 1910 (36 Stat., 531), make lands of a certain class, character, and situation subject to entry under the homestead law, subject to prescribed cultivation, "without the necessity of residence."

Section 2305, United States Revised Statutes, provides that the time which the homestead settler has served in the Army, Navy, or Marine Corps during certain wars may be deducted from the time required to perfect title, but provides that—

no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

December 24, 1915 [44 L. D., 504], the Department approved a circular submitted by your office, reading as follows:

The provisions of section 2305, R. S., are applicable to entries under section 6 of the enlarged homestead acts.

It appears that the rights and requirements under the statutes and regulations cited are not clearly understood, and in order that any

misunderstanding may be obviated, said circular of December 24, 1915, is hereby amended to read as follows:

The provisions of section 2305, Revised Statutes, are applicable to entries under section 6 of the enlarged homestead acts. Entrymen who comply with the requirements of said acts by cultivating the required area for the full period prescribed therein are not required to perform any residence upon the lands. Entrymen of lands designated under said section 6 who desire to invoke the benefits of section 2305, Revised Statutes, and secure credit for the time of service in the Army, Navy, or Marine Corps during the war, in lieu of residence, cultivation, and improvement, must be required to comply with the requirements of said section, namely, that they must show residence upon, and improvement and cultivation of, the homestead for a period of at least one year. In such case, cultivation of not less than one-sixteenth of the entire area of the entry for said period of one year must be shown.

LYMAN D. SWICK.

Decided August 18, 1916.

ENLARGED HOMESTEAD—ADDITIONAL ENTRY—ACT MARCH 3, 1915.

It is not necessary that one who has submitted final proof and received patent on his original entry shall have remained in continuous ownership of the land in order to entitle him to an additional entry under section 3 of the enlarged homestead act as amended March 3, 1915, provided he owns and occupies the same at the time of making application for the additional entry.

JONES, *First Assistant Secretary*:

Lyman D. Swick has appealed from the decision of December 17, 1915, rejecting his additional homestead application for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, T. 10 S., R. 27 E., W. M., La Grande, Oregon, land district.

The applicant having acquired title to his original homestead of 160 acres, sold or transferred it, and after seven years he reacquired title to the same land, which he owned and occupied at the date of this application under amended Sec. 3 of the enlarged homestead law. The Commissioner holds that the language of the law, which permits an entryman who has submitted final proof to make an additional entry, provided he still owns and occupies the land of his original entry, implies continuous ownership under the patent. It is believed that this is an unnecessarily technical construction of a statute of benevolent intentment.

* * * * *

The decision is accordingly reversed.

POWER PERMITS—HYDROMETRIC DATA—INSPECTION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, August 24, 1916.

The DIRECTOR,
Geological Survey.

DEAR SIR: In pursuance of the acts of February 15, 1901 (31 Stat., 790), and March 4, 1911 (36 Stat., 1253, 1254), and the regulations thereunder, you are hereby authorized and instructed:

1. In connection with each permit that provides for collecting hydrometric data, to arrange with the permittee for installing, maintaining, and operating suitable meters, measuring weirs, gages, or other devices for determining the flow of the stream or streams from which the water is to be diverted, the amount of water used in the operation of the project works, and the amounts of water stored and released from storage. The hydrometric operations should be of such nature that the "nominal stream flow," the "project storage flow," and the degree of utilization of the available stream flow may be ascertained with such accuracy as would be required under the conditions of the power project by the prevailing standards of hydrometric work of the Geological Survey. The entire expense with respect to the gaging stations so arranged for (except salaries of employees in the classified civil service of the United States) will be borne by the permittee and the operations at such stations should be so conducted by, or under the direction and supervision of, engineers of the Geological Survey as to yield thoroughly satisfactory records. In general, the records should be collected, transmitted, computed, and published as are other hydrometric records of the Survey.

2. To have inspection made within a reasonable time after the dates set for beginning and completion of work to determine whether compliance with the terms of the permit or grant has been made. Report of the conditions found on inspection with recommendation for action should be made to me through the General Land Office.

3. To prepare suitable report forms and to call on each final permittee and each grantee for annual report on such matters and in such detail (a) that a satisfactory determination can be made as to whether the terms of the permit are being complied with, whether the power business is being conducted in the public interest, and whether stockholders and bondholders are being properly served; and (b) that an adequate basis for revision of power capacities or of compensation to the Government will be obtained. Such report should be accompanied by a complete schedule of rates and copy of

each report made to a public utility commission and to the stockholders, and may properly contain information with respect to outstanding stocks and bonds and issues thereof during the year; names of officers, directors, and principal stockholders; amount of energy generated, transmitted, and delivered; load factors and load curves of power project and power system; available head; distance of transmission; stream flow and flow utilized; cost of energy and service; rates to consumers and customers; receipts from sale of energy; and any other matters requisite to a complete understanding of the operations of the permittee or grantee under the permit or grant. It is not desired that the making of these reports should be unnecessarily burdensome to the permittee or grantee, and endeavor should be made to call only for information that will be useful. So far as possible these reports should be made as of December 31.

Annual inspection of each power project should be made by an engineer of the Survey, and on or before December 1 of each year you will make report to me with respect to operations under power permits and grants, as disclosed by reports of permittees and grantees and inspectors.

4. To obtain from permittees and grantees detailed statements of their methods of accounting, and to cooperate with them and with the several public utility commissions and electric lighting, power, and railway associations with a view to encouraging the establishment of a uniform system of accounting.

5. To make such special inspection of sites under permit and to call on permittees for such special reports as circumstances may warrant.

Yours very truly,

FRANKLIN K. LANE.

SOUTHERN PACIFIC R. R. CO.

Decided August 31, 1916.

RAILROAD GRANT—MINERAL LAND.

Land upon which there is no present indication of mineral, nor any geological evidence that would warrant a mineral finding, should not be held mineral in character within the meaning of the excepting clause in the grant to the Southern Pacific Railroad Company merely on the premise that future prospecting might disclose evidences of mineral.

SWEENEY, Assistant Secretary:

This is an appeal by the Southern Pacific Railroad Company from a decision of the Commissioner of the General Land Office dated May 16, 1916, holding for cancellation its list No. 26 (serial No. 01222) and list No. 27 (serial No. 01223), as to certain lands in the Independence, California, land district, hereinafter described.

Adverse proceedings were directed by the Commissioner of the General Land Office upon the reports of field officers charging that the land is mineral in character as to the following described tracts:

List No. 26 (01222): Secs. 1 and 3, N. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 5, Secs. 9, 11 and 15, T. 31 S., R. 33 E.; SW. $\frac{1}{4}$, Sec. 17, Secs. 19 and 29, T. 29 S., R. 36 E.

List No. 27 (01223): Sec. 31, T. 29 S., R. 36 E.; Secs. 1, 3, 5 and 9, T. 31 S., R. 36 E.; S. $\frac{1}{2}$, Sec. 5, Sec. 7, W. $\frac{1}{2}$, Sec. 9, Secs. 17, 19, 21 and 29, T. 28 S., R. 33 E.; Sec. 1, Lots 1 and 2, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 7, Sec. 9, N. $\frac{1}{2}$ N. $\frac{1}{2}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 11, Secs. 13 and 15, T. 29 S., R. 33 E.; Secs. 1, 13 and 25, T. 29 S., R. 33 $\frac{1}{2}$ E.; Secs. 1, 3 and 5, T. 31 S., R. 34 E., M. D. M.

The statement of charges made an error as to the description of the lands listed in Sec. 11, T. 29 S., R. 33 E., the correct description of which is as follows: N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$. The railroad company withdrew its list No. 26 as to lots 2 and 7, Sec. 1, T. 31 S., R. 33 E. Counsel at the hearing stated that the railroad company had also eliminated from the controversy the SE. $\frac{1}{4}$, Sec. 13, T. 29 S., R. 33 E., but the record contains no formal evidence thereof. The NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, T. 31 S., R. 33 E., embraced in list No. 26, according to the record, was patented to C. W. Clarke, March 6, 1911, under forest reserve lieu selection No. 3140, dated September 29, 1900.

The railroad company denied the mineral character of all the lands except a very small area. After the hearing, the register and receiver, in their decision of September 18, 1915, found the following land to be mineral in character: The E. $\frac{1}{2}$, Sec. 1, Secs. 3, 5 and 9, T. 31 S., R. 36 E.; SE. $\frac{1}{4}$, Sec. 7, W. $\frac{1}{2}$, Sec. 29, T. 28 S., R. 33 E.; SE. $\frac{1}{4}$, Sec. 13, Sec. 11, T. 29 S., R. 33 E.; Sec. 13, NE. $\frac{1}{4}$, Sec. 25, T. 29 S., R. 33 $\frac{1}{2}$ E.; Secs. 1, 3 and 5, T. 31 S., R. 34 E.; lots 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13 and 14, S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 1, Sec. 3, N. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 5, Secs. 9, 11 and 15, T. 31 S., R. 33 E.; NW. $\frac{1}{4}$, Sec. 19, T. 29 S., R. 36 E. They found the following land to be nonmineral in character: Sec. 31, T. 29 S., R. 36 E.; W. $\frac{1}{2}$, Sec. 1, T. 31 S., R. 36 E.; S. $\frac{1}{2}$, Sec. 5, N. $\frac{1}{2}$ and SW. $\frac{1}{4}$, Sec. 7, W. $\frac{1}{2}$, Sec. 9, Secs. 17, 19 and 21, E. $\frac{1}{2}$, Sec. 29, T. 28 S., R. 33 E.; Sec. 1, lots 1 and 2, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 7, Sec. 9, W. $\frac{1}{2}$ and NE. $\frac{1}{4}$, Sec. 13, Sec. 15, T. 29 S., R. 33 E.; Sec. 1, lots 1, 2, 3 and 4 and SE. $\frac{1}{4}$, Sec. 25, T. 29 S., R. 33 $\frac{1}{2}$ E.; SW. $\frac{1}{4}$, Sec. 17, E. $\frac{1}{2}$ and SW. $\frac{1}{4}$, Sec. 19, Sec. 29, T. 29 S., R. 36 E., M. D. M.

The Commissioner in his decision found the entire area in controversy to be mineral in character, citing the case of the Central Pacific Railway Company (43 L. D., 545). In that case the Department held (syllabus):

To constitute land mineral within the meaning of the excepting clause to the grant to the Central Pacific Railway Company it is not necessary that it be shown as a present fact to contain mineral in paying quantities, but if evidence of mineral is found thereon sufficient, in the opinion of prudent and qualified persons, to warrant further exploration and expenditure, with reasonable prospect of success, the land is mineral within the meaning of the act and not subject to selection thereunder.

It was there said at page 545:

From contentions made in the appeal and brief it is apparent, as already stated, that the railway company is under the impression that it is incumbent upon the Government to show that the lands do not, as a present fact, expose mineral in paying quantities. As already indicated, this is not, in the opinion of the Department, in accordance with the law or the rulings of this Department, and *if any evidence of mineral is found upon the land*, and the showing is sufficient, in the opinion of prudent and qualified persons, to warrant further exploration and expenditure, with reasonable prospect of success, the land can not be classified as nonmineral, and is not subject to the grant to the railway company.

The Commissioner included in his finding of a mineral character lands upon which there is no present indication of any mineral nor any geological evidence upon which to base such a mineral finding, apparently upon the premise that future prospecting might disclose evidences of mineral. The Department is of the opinion that such a view is an unwarrantable extension of the doctrine laid down in the case of the Central Pacific Railway Company, *supra*.

Considering the present record in the light of that decision and taking into consideration the testimony adduced, both in behalf of the United States and the railroad company, the Department finds that the following lands were correctly classified to be mineral by the Commissioner:

No. 01222, list 26: Lots 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13 and 14, S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 1, Sec. 3, N. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 5, Sec. 9, Sec. 11, Sec. 15 (except the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, which has already been patented to C. W. Clarke, as above stated), T. 31 S., R. 33 E.

No. 01223, list 27: E. $\frac{1}{2}$, Sec. 1, Secs. 3, 5 and 9, T. 31 S., R. 36 E.; SE. $\frac{1}{4}$, Sec. 7, N. $\frac{1}{2}$, Sec. 17, SE. $\frac{1}{4}$, Sec. 19, W. $\frac{1}{2}$, Sec. 29, T. 28 S., R. 33 E.; lots 1 and 2 and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 7, Sec. 9, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$, Sec. 11, SE. $\frac{1}{4}$, Sec. 13, T. 29 S., R. 33 E.; Sec. 13, NE. $\frac{1}{4}$, Sec. 25, T. 29 S., R. 33 $\frac{1}{2}$ E.; Secs. 1, 3 and 5, T. 31 S., R. 34 E.

The two lists will accordingly be canceled as to the lands above described.

The following described lands are found to be nonmineral in character:

01223, list 27: W. $\frac{1}{2}$, Sec. 1, T. 31 S., R. 36 E.; S. $\frac{1}{2}$, Sec. 5, N. $\frac{1}{2}$ and SW. $\frac{1}{4}$, Sec. 7, W. $\frac{1}{2}$, Sec. 9, S. $\frac{1}{2}$, Sec. 17, N. $\frac{1}{2}$ and SW. $\frac{1}{4}$, Sec. 19, Sec. 21, E. $\frac{1}{2}$, Sec. 29, T. 28 S., R. 33 E.; Sec. 1, W. $\frac{1}{2}$ and NE. $\frac{1}{4}$,

Sec. 13, Sec. 15, T. 29 S., R. 33 E.; Sec. 1, lots 1, 2, 3 and 4, SE. $\frac{1}{4}$, Sec. 25, T. 29 S., R. 33 $\frac{1}{2}$ E. The list will, accordingly, in the absence of other objection, be approved as to these lands found to be non-mineral in character.

The record discloses that it was impossible to identify upon the ground the lands listed and applied for in T. 29 S., R. 36 E., due to the fact that no monuments of the survey could be found. All of the witnesses agreed that they could not testify with accuracy as to lands located in this township and the locus of the land is fixed differently by the various witnesses. The decisions of the register and receiver and the Commissioner, therefore, as to the SW. $\frac{1}{4}$, Sec. 17, Secs. 19, 29 and 31, T. 29 S., R. 36 E., are vacated and recalled and the Commissioner will proceed to either reestablish the monuments of survey in this township or secure a resurvey thereof and thereafter readjudicate the lists as to these lands.

The decision of the Commissioner is accordingly modified as above set forth and the matter remanded for further proceedings in harmony herewith.

**ALASKA UNITED GOLD MINING CO. ET. AL. v. CINCINNATI-
ALASKA MINING CO. ET AL.**

Decided April 18, 1916.

MINING CLAIM—ADVERSE PROCEEDING.

Section 2326, Revised Statutes, and the concluding portion of the preceding section, relating to proceedings between adverse claimants under the mining laws, have reference to unperfected mining claims to areas subject to patent under the mining laws, and not to tracts the legal title to which has at the date of the patent application passed out of the government, and have no application in a case where the question is whether the area involved is public land of the United States and as such is susceptible of conveyance by a United States patent.

PATENTS—PLATS AND FIELD NOTES.

Plats and field notes referred to in patents may be resorted to for the purpose of determining the limits of the areas that passed under the patents.

MINING CLAIM—PATENT—PLAT AND FIELD NOTES.

Reference in a patent for a mining claim to the mineral lot number of the claim is a sufficient reference to the plat and field notes of survey of such claim to render them admissible in evidence for the purpose of showing that the lines of such claim bordering on a water front are in fact meander lines.

SURVEY—MEANDER LINES.

A meander line is a line run in the survey of particular portions of the public domain bordering on a stream or other body of water, not as a boundary of the tract surveyed, but for the purpose of defining the sinuosities of the bank or shore of the water and as a means of ascertaining the quantity of land within the surveyed area subject to sale.

SURVEY OF MINING CLAIM—MEANDER LINES.

The rule as to meander lines is applicable to mining claims, and where in the course of an official patent survey of a mining claim abutting upon a navigable body of water a meander line has been run, which follows as nearly as practicable the shore line of the water, such shore line, and not the meander line, must be taken as a boundary of the claim when patented according to the plat and field notes of the survey.

MINING CLAIM—MEANDER LINE—RIPARIAN RIGHTS.

Where one of the boundaries of a patented mining claim is a navigable body of water, all accretions formed after survey and prior to entry and patent of the tract passed under the patent, and all accretions that may thereafter form become the property of the riparian proprietor.

JONES, First Assistant Secretary:

This case is before the Department on separate appeals filed, respectively, by the Cincinnati-Alaska Mining Company, and John Johnson, hereinafter designated as the applicants, from the decision of the Commissioner of the General Land Office of November 1, 1913, holding for cancellation their mineral entry 01286, for what is denominated the Ready Bullion Nos. 3 and 4 lode mining claims, survey No. 768, situate on Douglas Island, Juneau land district, Alaska.

The area included in the claims, which lie end to end, comprises a strip of land a little more than 1,900 feet in length and varying from about 45 feet to 160 feet in width, containing 3,559 acres, lying longitudinally in a northwesterly-southeasterly direction along the northeasterly side of said Douglas Island and bordering Gastineau Channel, a navigable body of water. The southwesterly side lines of the area are represented by the plat and field notes of the survey of said claims as being coincidental with the northeasterly side lines of the patented Golden Chariot lode (survey No. 104) and the Omega lode and mill site (survey No. 105 A and B), the northeasterly boundary of the area being represented as the line of mean high tide of Gastineau Channel.

The claims purport to have been located in 1901, and application for patent thereto was filed October 22, 1907. During the period of publication of notice of the application separate protests and so-called adverses were filed against the application by the Alaska United Gold Mining Company, and Alaska-Mexican Gold Mining Company, upon which suit was instituted. The suit, however, did not proceed to trial, but, by stipulation of the parties was dismissed, whereupon, and on December 14, 1909, certificate of entry was issued to applicants.

December 15, 1909, the said Alaska United Gold Mining Company, and Alaska-Mexican Gold Mining Company, claiming as owners of the Golden Chariot and Omega lode mining claims, and Omega mill-site claim, filed protest against the entry, charging, substantially, that the Ready Bullion Nos. 3 and 4 claims conflict, in part, with the said Golden Chariot and Omega claims, but that the said survey No.

778 fails to show such conflict; that the Ready Bullion Nos. 3 and 4 claims, except as to the conflict, embrace tide lands of Gastineau Channel and are covered at mean high tide by the waters of the channel; that no discovery of a lode of mineral-bearing rock in place has been made within the limits of either of the claims; and that the statutory expenditure of \$500 upon or for the benefit of either of the claims had not been made. After proceedings not necessary to be here stated hearing was directed by the Commissioner, and the same was had commencing July 20, 1911. Upon consideration of the record the local officers found and held that:

No conflict as alleged by protestants, exists between survey No. 768 and surveys 104 and 105 A and B; that the seaward line of survey 768 is not the line of ordinary high tide, and that the survey as made by them extends below the line of ordinary high tide as shown by the evidence; that the applicants or their grantors on the Ready Bullion No. 3 have made a discovery of a vein or lode within the limits of the survey, but that said discovery is below the line of ordinary high tide and therefore not a sufficient basis for a valid mining location; that they have made a discovery in the shaft on the Ready Bullion No. 4 but that the lode line as indicated in their survey of this claim, is not the lode line as determined by the evidence; that the applicants have made the required development expenditure on the Ready Bullion No. 4, but that no part of the work done on said claim tends to the development of the Ready Bullion No. 3 as surveyed.

For the reasons given they recommended that the entry be canceled.

On appeal by the entryman the Commissioner in the decision here complained of found and held that the patents to the Golden Chariot lode, and the Omega lode and mill site, conveyed to the patentees all the public land lying between the southwesterly side lines of said claims and the shore of Gastineau Channel, together with all the rights and conditions incident to littoral ownership of lands, including the right to all land formed by accretion along the shore, and hence that there was not at the date of the purported Ready Bullion Nos. 3 and 4 locations any public land of the United States within the limits of such claims that would be subject to location. He accordingly affirmed the action of the local officers, but for reasons different from those assigned by them, and held the entry for cancellation.

The applicants have urged at every previous available stage of these proceedings, and in their appeals strenuously insist, that the land department is without jurisdiction to determine the issues herein presented for the reason, they assert, that such issues go solely to the right of possession as between the contending parties to the area in question, and are, therefore, matters exclusively for the determination of the courts; that the protestants having failed to press the suit instituted by them to final determination, the applicants, irrespective of the merits of the controversy, are entitled to a patent under the provisions of section 2326 of the Revised Statutes, which provides that:

It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.

The Department is not impressed with the soundness of this contention. Said section 2326 and the concluding portion of the preceding section, which relates to the same subject-matter, have reference to unperfected mining claims to areas subject to patent under the mining laws, and not to tracts the legal title to which has at the date of the patent application passed out of the Government, as it is only unentered public lands of the United States that may be patented under the mining laws. Or, as was said by the Supreme Court of the United States in *Iron Silver Mining Company v. Campbell* (135 U. S., 286, 299):

The purpose of the statute seems to be, that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these *claimants* shall have the patent, the final evidence of title, from the government.

In the same connection Mr. Lindley, in his work on Mines, third edition, section 718, says:

It [an adverse claim] is necessarily based upon the assumption that the paramount title to the tract applied for resides in the general government, whose patent when regularly issued would operate as a judgment conclusive upon those who failed to assert their adverse rights.

In this case the question presented for determination is whether the area involved is public land of the United States, and as such susceptible of conveyance by a United States patent, it being asserted by the protestants that the entire area embraced in the application lying above the line of mean high tide of Gastineau Channel was either included within the limits of the patented Golden Chariot and Omega lodes and Omega mill site, or accrued to themselves as riparian owners under their patents to said claims. The objection, therefore, of the applicants to the jurisdiction of the Department is accordingly overruled and the case will be determined on its merits.

To sustain their charges that the Ready Bullion Nos. 3 and 4 claims conflict to the extent of the nontide-land portion thereof with the area embraced in the patented Golden Chariot and Omega lodes and Omega mill site, the protestants introduced in evidence, over the objections of the protestees, the plats and field notes of surveys No. 104 and No. 105 A and B of said claims, with a view to supplementing or explaining the patents to said claims and showing that the area included therein as surveyed and intended to be patented extended in the seaward direction to the line of mean high tide of Gastineau Channel. The Commissioner held this evidence to be admissible and accepted it as tending in part to show that no public land of the United States existed between said claims as patented and the present shore line of Gastineau Channel, and hence that there was no such area subject to location and entry under the mining laws as that included in the Ready Bullion Nos. 3 and 4 claims. The correctness of the Commissioner's action in that regard is vigorously challenged by the appellants, who contend that the patents are conclusive as to the matters contained therein, and can not be read and construed in the light of the plat and field notes of the survey forming a part of the record upon which they were issued.

The recitals contained in the patent to the Golden Chariot (which is dated July 2, 1890) are, so far as are here material, as follows:

Whereas . . . there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate No. 17, of the ex-officio register of the Land Office at Sitka, Alaska, accompanied by other evidence, whereby it appears that the Alaska Mill and Mining Company did, on the eleventh day of November, A. D. 1889, duly enter and pay for that certain mining claim or premises known as the . . . Golden Chariot lode mining claims designated by the ex-officio Surveyor General as Lots Nos. . . . 104 . . . and embracing a portion of the unsurveyed public domain, in the Harris Mining District, in Alaska, in the District of Lands subject to sale at Sitka, and bounded, described, and platted as follows with magnetic variation twenty-nine degrees and thirty minutes east.

* * * * *

Beginning for the description of lot No. 104, at a post marked No. 1, U. S. Sur. No. 104; being also post No. 1 of said lot 103, hereinbefore described.

* * * * *

Thence, fourth course, north forty-five degrees east three hundred feet to a post marked No. 5, U. S. Sur. No. 104; four hundred and sixty-five feet to a post marked No. 6, U. S. Sur. No. 104 from which U. S. mineral monument No. 1 bears north forty-two degrees and forty-seven minutes west seven thousand four hundred and sixty feet distant.

Thence, fifth course, south fifty-three degrees and forty minutes east one thousand and ninety-four and two tenths feet to a post marked No. 7, U. S. Sur. No. 104.

Thence, sixth course, north eighty-seven degrees and forty-five minutes east one hundred and seventy-six and seven tenths feet to a post marked No. 8, U. S. Sur. No. 104.

Thence, seventh course, south forty-five degrees and forty-five minutes east two hundred and fifteen feet to a post marked No. 9, U. S. Sur. No. 104, being also post No. 2 of said lot 103.

The material recitals in the patent dated September 18, 1891, to the Omega lode and mill site, are as follows:

Whereas . . . there have been deposited in the General Land Office of the United States the Plat and Field Notes of Survey and the Certificate No. 19 of the ex-officio Register of the Land Office at Sitka, Alaska, accompanied by other evidence whereby it appears that the Mexican Gold and Silver Mining Company did, on the twelfth day of December, A. D. 1889, duly enter and pay for that certain mining claim or premises, known as the Omega, . . . lode mining and Omega . . . millsite claims, designated by the ex-officio Surveyor General as Lots Nos. 105 A . . . 105 B . . . respectively, embracing a portion of the unsurveyed public domain in the Harris Mining District, in Alaska, in the District of Lands subject to sale at Sitka, and bounded, described, and platted as follows, with magnetic variation twenty-nine degrees and thirty minutes east.

* * * * *
Thence, second course, south sixty degrees east nine hundred and ninety-eight and two tenths feet to post No. 3.

Thence, third course, south forty-two degrees and twenty-six minutes east four hundred and thirty-two feet to a post marked No. 4 U. S. Sur. No. 105 A, from which U. S. mineral monument No. 1 bears north forty-two degrees and forty-seven minutes west seven thousand four hundred and sixty-six feet distant.

Thence, fourth course, south forty-five degrees west one hundred and sixty-five feet to post No. 5.

* * * * *
Beginning for the description of lot 105 B, at a post marked No. 1 U. S. Sur. No. 105 B, being also post No. 3 of lot No. 105 A, hereinbefore described, and situate on meander line of Gastineaux channel.

Thence, first course, north sixty degrees west nine hundred and ninety-eight and two tenths feet to post No. 2, being also post No. 2 of said lot No. 105 A.

* * * * *
Thence, fourth course, south fifty-seven degrees and twenty-six minutes east eight hundred and fifty-four and five tenths feet to post No. 5.

Thence, fifth course, south forty-three degrees and thirty minutes east five hundred and forty and four tenths feet to post No. 1, the place of beginning.

But one reference is made in the above descriptions to Gastineau Channel, but the official plats of survey of these claims show that corners Nos. 6, 7, 8, and 9 of the Golden Chariot, corner Nos. 3 and 4 of the Omega lode, and corners Nos. 1 and 5 of the Omega mill site, were established substantially on a line represented on said plats as the "meander line" of Gastineau Channel. The field notes of survey No. 104 of the Golden Chariot read in part as follows:

Beginning at a post marked "No. 1 U. S. Sur. No. 104" at original location notice.

* * * * *
4th Course N. 45° 00' E. 300 feet post marked "No. 5 U. S. Sur. No. 104" 465 feet post marked "No. 6 U. S. Sur. No. 104." On meander line of Gastineaux channel thence

5th Course S. 53° 40' E. 1,094.2 feet post marked "No. 7 U. S. Sur. No. 104."

On meander line of Gastineaux channel thence

6th Course N. 87° 45' E. 176.7 feet post marked "No. 8 U. S. Sur. No. 104."

On meander line of Gastineaux channel thence

7th Course S. 45° 45' E. 215 feet post marked "No. 9 U. S. Sur. No. 104."

On meander line of Gastineaux Channel Identical with post "No. 2 U. S. Sur. No. 103."

The material portions of the field notes of survey 105 A and B of the Omega lode and mill site are as follows:

Beginning at a post marked "No. 1 U. S. Sur. No. 105 A."

* * * * *

2nd Course S. 60° 00' E. 998.2 feet post marked "No. 3 U. S. Sur. No. 105 A."

On the Meander line of Gastineaux Channel; thence

3rd Course S. 42° 26' E. 432 feet post marked "No. 4 U. S. Sur. No. 105 A"

being identical with post "No. 6 Lot No. 104." On the meander line of Gastineaux Channel.

* * * * *

Beginning at a post marked "No. 1 U. S. Sur. No. 105 B," being identical with post "No. 3 U. S. Sur. No. 105 A." On Meander line of Gastineaux Channel;

* * * * *

4th Course S. 57° 26' E. 854.5 feet post marked "No. 5 U. S. Sur. No. 105 B."

On meander line of Gastineaux Channel; thence

5th Course S. 43° 30' E. 540.4 feet post marked "No. 1 U. S. Sur. No. 105 B" the place of beginning.

It has been repeatedly held by both State and Federal courts that plats and field notes referred to in patents may be resorted to for the purpose of determining the limits of the area that passed under such patents. In the case of *Cragin v. Powell* (128 U. S., 691, 696) the Supreme Court said:

It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat, itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.

In *Jefferis v. East Omaha Land Company* (134 U. S., 178, 194), it is held:

It is a familiar rule of law, that, where a plat is referred to in a deed as containing a description of land, the courses, distances, and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed.

In *Chapman & Dewey Lumber Company v. St. Francis Levee District* (232 U. S., 186, 197), it is said:

The explanatory words "according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General" constitute another element, and a very important one, for it is a familiar rule that where lands are patented according to such a plat, the notes, lines, landmarks and other particulars appearing thereon become as much a part of

the patent and are as much to be considered in determining what it is intended to include as if they were set forth in the patent.

In *Mitchell v. Smale* (140 U. S., 406, 413), it is held:

The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

In the case of *Steele v. Taylor* (13 Am. Dec., 151, 152), it is said:

On the trial, after the cause was remanded to the circuit court, the only question which was made, grows out of a variance in the description of the land claimed by the lessor of the plaintiff, as contained in the original plat and certificate of survey, and the patent under which he derives title. The plat and certificate of survey describes the tract with four lines and corners, and lines and corners corresponding with the lines and corners of the survey were found plainly marked, except at the place where the second corner of the survey is described to be, there was no marked corner found. But the patent calls for only three lines and corners, omitting the call for the second corner, as described by the certificate of survey, and the course and distance from there to the third corner. The counsel for the defendants contended that the lessor of the plaintiff could recover under his patent no more land than was embraced in the triangle formed by extending a line from the beginning to the third corner, as described in the survey, and running from thence with the two remaining lines to the beginning; and moved the court to so instruct the jury, but the court overruled the motion, and instructed the jury to find agreeably to the calls of the survey. . . .

We have no doubt that the circuit court decided correctly. . . . The survey is matter of record of equal dignity with the patent itself, is referred to by the patent, and is the only source from which the description of the boundaries contained in the patent was originally taken.

In *Chapman v. Polack et al.* (11 Pac., 764), it is said at page 768:

Where a map or plan of a tract of land, with lines drawn upon it marking the boundaries, and with the natural objects upon its surface laid down, is referred to in a deed containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself. *Vance v. Fore*, 24 Cal. 436; *Mayo v. Mazeaux*, 38 Cal. 442; *Serrano v. Rawson*, 47 Cal. 52; *Black v. Sprague*, 54 Cal. 266.

As was said in *Vance v. Fore*, *supra*: "The map may be regarded as a daguerreotype of the land which the grantor intended to convey." All the objects represented upon a plan are to have the same effect as they would if brought into the deed by verbal description. *Thomas v. Patten*, 13 Me. 333.

In *Round Mountain Mining Company v. Round Mountain Sphinx Mining Company* (138 Pac., 71), the court, at page 75, says:

In *Waskey v. Hammer*, 223 U. S. 85, 32 Sup. Ct. 187, 56 L. Ed. 359, the court says: "Within the limits of their (mineral surveyors) authority they act in

the stead of the Surveyor General and under his direction, and in that sense are his deputies. The work which they do is the work of the government, and the surveys which they make are its surveys."

The plat and field notes of the deputy mineral surveyor must, also, have the approval of the United States Surveyor-General before they are transmitted to the General Land Office. The fact that the field notes of a group patent contain exclusions of the conflict area between the respective claims of the group in favor of certain claims, which exclusions may have been made, and we presume are usually made, at the suggestion of the applicant for the patent, cannot, we think, properly be said to be the mere self-serving declarations of the applicant. No matter at whose suggestion made, when the exclusions are embodied in the field notes of the deputy mineral surveyor and are approved by the Surveyor-General, they are the exclusions made by the officials of the government, upon whom the duty is imposed of making the same, and when patent issues and therein refers to such field notes the exclusions therein mentioned become the exclusions of the government itself.

As said by the Supreme Court of the United States in the *Lawson Case*, supra: "It is to be assumed that the patents were issued . . . upon the surveys made under the direction of the United States Surveyor General." It is well settled that a reference in a patent to the official plat and surveys makes such plat and the field notes of such survey "a part of the description of the land granted, as fully as if they were incorporated at length in the patents." *Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; *Chesapeake R. Co. v. Washington R. Co.*, 199 U. S. 247, 26 Sup. Ct. 25, 50 L. Ed. 175; *Alexander v. Lively*, 5 T. B. Mon. (Ky.) 159, 17 Am. Dec. 50; *Steele v. Taylor*, 3 A. K. Marsh. (Ky.) 225, 13 Am. Dec. 151. The plat and field notes referred to in patents have been referred to frequently by the courts to determine matters of boundary. The question of a reference to the field notes for the purpose of construing a patent to a group of mining locations has not heretofore been resorted to so far as we are advised. We can see no reason why such reference may not be made. The real boundaries of the several conflicting locations may be determined only by a knowledge of the exclusions of the territory in conflict between them:

In opposition to the rule thus variously stated appellants cite a number of decisions, all of which have been carefully examined by the Department. Only one of the cases cited, however, is found to be in point. That is the case of the *Alaska Gold Mining Company v. Barbridge et al.* (1 Alaska, 311), which, it appears, involved a portion of the area included in the two claims here in question. One of the questions raised there was whether the plat and field notes of what is shown by the present record to be the *Golden Chariot*, hereinabove referred to, were admissible to explain the patent to said claim. In deciding that point the court said at page 320:

It is claimed on the part of the plaintiff that the patented lands constituting their several lode mining claims run to the shore of Gastineau channel, and that there is no land between their lode claim and the said channel upon which the defendants could lawfully enter to make exploration or discovery; that the apices of any veins that can be found above mean high tide along the shore of said channel, opposite their several patented claims, are all within the boundary lines of their several patented claims; that the meander line fixing the boundaries of their several claims, while indicated in the patent and survey by several stakes and monuments, is in fact the meander line of Gastineau channel, not-

withstanding such fixed boundary points as are described in the patent. In aid of the description of the land covered by their several patents, they offer the field notes of the survey made by the United States mineral surveyor Garside, and also the oral testimony of Garside, to show the intent and purpose of said survey in fixing said boundary line along Gastineau channel. When this evidence was offered, objection was made by the defendants, on the ground that the same was incompetent, and that the patent is the only competent evidence that can be offered in this case to show the lands embraced by the same. It is believed that the legal effect of a conveyance must be determined by the terms employed therein, and that nothing can be added to or taken from the same by parol testimony. This is undoubtedly the general rule controlling the question of testimony. . . . But if there is a latent ambiguity in the description itself as furnished by the deed or patent, then the true intent and meaning may be added by parol. . . .

It is said in the case at bar that the field notes that have been offered in evidence make reference to the meander line of Gastineau channel, but the patent offered in evidence makes no reference to Gastineau channel whatever, and determines the lines by the monuments and courses and distances run. The contention of the defendants is that the field notes of the surveyor cannot be introduced to help out the lines established by the patent, or to explain the same; that there is no latent or patent ambiguity in the conveyance issued by the government, and that there is therefore nothing to explain. It is not claimed by the plaintiff that there is any mistake in the patent. And not only are the field notes of the surveyor that were offered in evidence objected to by the defendants, but also the oral testimony of Surveyor C. W. Garside as to what his intentions were in fixing the line of the claim owned by plaintiff bordering on the Gastineau channel. My recollection is that the field notes referred but once to the tide water of the channel. Nothing in the field notes and nothing in the patent is found fixing the boundaries of the claim on that side by the line of the sea or the shore line of Gastineau channel. The court is unable to see in what particular the field notes of the surveyor aid or explain the directions and distances given in the patent itself. The field notes are therefore rejected as evidence in this case.

The Department is not persuaded that said last-cited decision correctly states the law. On the other hand, it is of opinion that under the rule announced and followed in the decisions previously cited, the patents here relied upon, by reciting the mineral lot numbers of the respective claims, make a sufficient reference to the plats and field notes of survey of such claims to render them admissible in evidence in this case for the purpose of showing that lines 6-7 and 7-8 of survey No. 104 of the Golden Chariot lode, line 3-4 of survey No. 105 A of the Omega lode, and line 5-1 of survey No. 105 B of the Omega mill site, were in fact meander lines. It is accordingly held that this evidence was properly considered by the Commissioner.

A meander line is a line run in the survey of particular portions of the public domain bordering on a stream or other body of water, not as a boundary of the tract surveyed, but for the purpose of defining the sinuosities of the bank or shore of the water and as a means of ascertaining the quantity of land within the surveyed area

subject to sale. In preparing the official plat of survey, such line is represented as the border line of the water and shows ordinarily to a demonstration that the watercourse and not the meander line is the boundary. *Railroad Company v. Schurmeir* (7 Wall., 272); *Jefferis v. East Omaha Land Company* (134 U. S., 178); *Hardin v. Jordan* (140 U. S., 380); *Whitaker v. McBride* (197 U. S., 510). If, therefore, the doctrine of meander lines applies to claims patented under the lode-mining and mill-site laws and the seaward lines of said patented claims of the protestants be in fact meander lines, the patents thereto must be construed as embracing and including the area, if any such there be, lying between meander line of said claims as run and the line of mean high tide of Gastineau Channel, as it existed at the dates of the surveys and patents.

Appellants earnestly contend, however, that the rule of meander lines has no application to lode and mill-site claims, but relates only to ordinary public-land surveys, surveys of Mexican land grants, and other similar private claims to nonmineral lands, and surveys of Alaska homesteads, and claims used and occupied for purposes of trade and business. To support this contention it is argued that the application of such a rule to lode mining claims might result in the claimants' acquiring title to an area exceeding in length or width the dimensions prescribed by section 2320 of the Revised Statutes. It is further urged that section 2325 of the Revised Statutes requires that the survey of the lode mining claim shall show "accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground," and in this connection they cite section 2327 of the Revised Statutes as amended by the act of April 28, 1904 (33 Stat., 545), which provides that:

Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent is based, . . . The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

Appellants specifically disclaim any intention to assert that an applicant for patent to a lode mining claim can not meander a body of water or that the owner of a patented mining claim which actually borders upon a stream or other natural body of water is not entitled to the riparian and littoral rights enjoyed by other shore owners. They contend, however, that a body of water itself can not be adopted as a boundary of a mining claim for the reason that it is not a monument but a natural object, and hence does not comply with the requirements of the statute. While conceding that there

is nothing in the law that would preclude a mineral surveyor from surveying as the boundary line of a lode claim a meander line along the shore of a body of water, they urge that when such line is surveyed it must be marked upon the ground by monuments, and that then the line so marked and not the body of water becomes the boundary; that if this work be performed accurately, and the line thus established be identical with the shore line, the claimant becomes a riparian or littoral owner and is entitled to all the rights and privileges of other riparian or littoral owners, but that if the meander line as thus surveyed be not identical with the shore line, the meander line nevertheless remains the boundary, and that no portion of the claim lying between the shore line and the meander line thus established passes under a patent to the claim, but, on the other hand, remains public land of the United States and subject to entry as other public lands.

The practice of running meander lines in connection with the surveys of public lands of the United States does not rest upon any specific statutory provision, but is one of expediency. It has, however, almost uniformly received the sanction of the courts. The reason for the running of such lines is well stated by the Supreme Court in *Mitchell v. Smale* (140 U. S., 406), wherein the court at page 413 said:

The pretence for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream.

This is the first case coming before the Department wherein the rule as to meander lines has been invoked in behalf of a lode or mill-site claim, one or more of whose lines as surveyed is designated as a meander line. The Department has, however, itself invoked the rule as against a lode mining claim abutting upon a body of water. This was in the case of *Victor A. Johnson* (33 L. D., 593), involving three lode mining claims, portions of which as originally surveyed for patent were shown to lie below the line of high-water mark of a certain lake. In that case it was said:

The lake is situate upon unsurveyed public lands, and is stated to cover an area of about 43½ acres. Your office finds from the record that the lake is a permanent body of water, possessing the characteristics which, under paragraphs 153 to 172 of the manual of instructions for the survey of the public lands (Manual of 1902), will require the meander thereof when the public surveys are extended to the lands embracing it, special reference being made to

paragraph 164 of the manual, which contemplates the meander of bodies of water of areas of 25 acres and upwards. It is stated by your office to have been its practice for a number of years to require the meander of mining claims upon unsurveyed lands, where they border upon such lakes and streams as would under the rules be meandered, to coincide with such meander lines as would be established by a public survey.

* * * * *

In harmony with the long-established and well-considered regulations prescribing the meander of such a body of water as this, upon extension of the public surveys, claims upon the borders thereof should be meandered to conform to what would be the line established by a public survey and into which the public-survey lines would be closed. The official meandering of these bodies of water fixes and declares the limits of the public lands subject to sale, thereby excluding the submerged areas, and relegates all questions of right or title in riparian patentees to the soil beneath the water to be determined by the laws of the State in which situate. In view of the existing regulations, in contemplation of which such submerged lands are uniformly to be excluded, the government should not by its patent anticipate or embarrass the adjustment of rights between State and riparian owners. The practice of your office, as it is stated in the decision appealed from, has the full approval of the Department.

* * * * *

If a hearing shall be applied for and had, appellant will be required to have surveyed and established a meander line in accordance with the showing made. In the absence of an application for hearing within the time allowed therefor, meander will be required along the present mean high water mark.

It is obvious that the line thus ordered to be run was no more nor no less than the meander line required by the manual of instructions for the survey of public lands, and was exclusively for the purpose of fixing and determining riparian rights of the owners of the claims with respect to the submerged area upon which the claims abutted. This being true it was clearly contemplated by the Department that the area to be patented under such survey should extend to the line of mean high-water mark of the lake, even though the meander line should not exactly coincide with the line of high water. In other words it exhibits the policy of the Department respecting the applicability of the meander line rule to mining claims entered according to special surveys.

The fact that a meander line as run by the surveyor of a mining claim does not precisely coincide with the shore line of a body of water upon which the claim abuts, and that no artificial monuments are established on such water line does not render forcible the objections of the appellants respecting the nonestablishment of such artificial monuments. The contention of appellants in this behalf is sufficiently answered by the concluding portion of the first quotation hereinabove made from *Mitchell v. Smale*, wherein a lake or stream is held by the Supreme Court to be a monument. And in *Higuera v. United States* (5 Wall., 827, 835), it is said:

But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and

always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings.

The Department is clearly of the opinion that the rule as to meander lines is, both in principle and reason, as applicable to mining claims as to other classes of claims, and that where in the course of an official patent survey of a mining claim abutting upon a navigable body of water a meander line, which follows as nearly as practicable the shore line of such water, has been run, such shore line and not the meander line must be taken as a boundary of the claim when patented according to the plat and field notes of the survey of such claim.

The evidence shows that of the monuments originally set by Mineral Surveyor Garside to mark the meander corners of the Golden Chariot claim, but one remains, namely, corner No. 8 of survey No. 104, the other monuments apparently having long since been destroyed and obliterated. The witnesses agree, however, as to the exact location of corner No. 7 of that survey, so that this corner may be regarded as having been correctly reestablished. Respecting the point which should be established as the locus of corner No. 6 of said survey, which is also common to corner No. 4 of the Omega claim survey No. 105, the evidence is irreconcilably conflicting. The difficulties encountered in the reestablishment of this corner are due to the fact that both the courses and distances of all of the lines of the survey including the tie line are inaccurately given by Garside. The same difficulties also exist with respect to the reestablishment of corner No. 3 of the Omega claim survey No. 105, also common to corner No. 1 of the Omega mill-site claim survey 105 B, and corner No. 5 of the latter claim, all originally established as marking the points where the lines of said claims would meet the waters of Gastineau Channel. The entire situation is further complicated by the fact that none of the other corners of the Omega mill-site, and but one (corner No. 6) of the Omega lode, have been preserved, and that a certain bearing-point, consisting of the portal of a tunnel, to a corner of the Omega lode, has been destroyed by excavations at that place.

As to all of the seaward corners of these claims however, it is clear, as shown by the plat and field notes of the survey and the evidence in the case, that they were placed substantially on the line of ordinary high tide of Gastineau Channel as it existed at the time of the surveys and were intended to mark the points where the side or end lines of these claims, as the case may be, met the waters of the channel, and to thus establish the shore line as the seaward boundaries of the Golden Chariot and Omega lode claims and Omega mill-site claim.

The amended certificates of location of the Golden Chariot and Omega lode claims described parallelograms 1,500 by 600 feet. These claims as surveyed for patent are diminished to the extent that each embraces land covered by the tides or waters of Gastineau Channel, a triangular area of about 2 acres having thus been eliminated from the northeasterly corner of the Omega, as located, and a strip from 125 to 225 feet in width, and 1,415 feet in length, embracing about 7 acres, from the Golden Chariot. The Omega mill-site is shown to have been made fractional by its abutment upon the channel in that it includes but 4.41 acres of the maximum area of 5 acres, which might otherwise have been embraced therein.

The evidence in the case conclusively shows that for considerable distances the line of ordinary high tide of Gastineau Channel lay to the landward of lines projected between the points established as the seaward corners of the three claims mentioned and that if any land lay to the seaward of such lines, it consisted of tracts of negligible area the dimensions of which are not susceptible of determination from the present record.

In view of the foregoing it must be held that the patents to the Golden Chariot lode survey 104 and Omega lode and mill-site surveys 105 A and B, embraced the entire areas lying within the line of ordinary high tide of Gastineau Channel as it existed at the times of survey, and the other lines of said claims. No ground exists to the seaward of that line save that formed by accretions due to natural or artificial causes since the dates of said surveys Nos. 104 and 105 A and B. Such land is not subject to location, entry and patent under the mining laws of the United States, as it is well settled that accretions formed after survey and prior to entry and patenting of a tract, pass to the patentee, and that accretions thereafter formed become the property of the riparian proprietors. *Jefferis v. East Omaha Land Company* (134 U. S., 178); *Shively v. Bowlby* (152 U. S., 1); *Harvey M. La Follette et al.* (26 L. D., 453); *John J. Serry et al.* (27 L. D., 330).

It follows, therefore, that there is no land within the limits of the purported Ready Bullion Nos. 3 and 4 locations now applied for, that is subject to location, entry and patent under the mining laws of the United States.

The decision of the Commissioner is accordingly affirmed and the entry will be canceled.

**ALASKA UNITED GOLD MINING CO. ET AL. v. CINCINNATI-
ALASKA MINING CO. ET AL.**

Motion for rehearing of departmental decision of April 18, 1916, 45 L. D., 330, denied by Assistant Secretary Sweeney October 14, 1916.

**STATUTES AND REGULATIONS GOVERNING ENTRIES AND
PROOFS UNDER THE DESERT-LAND LAWS.**

CIRCULAR.

[No. 474.]

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., May 18, 1916.***

1. All the more important laws and portions of laws governing the making of desert-land entries, assignments thereof, and the proofs required, will be found printed in full at the end of this circular, and are as follows: Act of March 3, 1877 (19 Stat., 377); act of August 30, 1890 (26 Stat., 391); act of March 3, 1891 (26 Stat., 1095); section 2294, United States Revised Statutes, as amended by the act of March 4, 1904 (33 Stat., 59); act of March 28, 1908 (35 Stat., 52); act of March 3, 1909 (35 Stat., 844); act of June 22, 1910 (36 Stat., 583); act of April 30, 1912 (37 Stat., 106); act of July 17, 1914 (38 Stat., 509); act of September 5, 1914 (38 Stat., 712); and part of act of March 4, 1915 (38 Stat., 1138-1161).

It seems to be the purpose of these statutes to encourage and promote the reclamation, by irrigation, of the arid and semiarid public lands of the Western States through individual effort and private capital, it being assumed that settlement and occupation will naturally follow when the lands have thus been rendered more productive and habitable.

Such reclamation is often a difficult and expensive undertaking, and desert-land entrymen sometimes find serious difficulty in complying with all the requirements of the law, particularly persons who possess little capital. All claimants should restrict their entries to only that quantity of land which they can reasonably expect to reclaim, even though such area be much less than may be lawfully entered. As the more accessible and easily appropriated streams become exhausted, it becomes necessary to convey water, often for very long distances, from more remote sources of supply; more elaborate and expensive systems of irrigation works are required, the cost of water rights is correspondingly increased, and individuals consequently find it necessary to unite their efforts in various forms of co-operative enterprise in order to secure the necessary capital. Nevertheless, a small tract of land, thoroughly reclaimed, with an adequate water supply obtained from a large, well-constructed irrigation system, may well be considered a very valuable piece of property, and more desirable than a larger tract only partially reclaimed, or reclaimed from a small, private irrigation system, less permanent and efficient in character.

STATES IN WHICH DESERT-LAND ENTRIES MAY BE MADE.

2. The act of March 3, 1877, provided for the making of entries of desert land in the States of California, Nevada, and Oregon, and in the then Territories of Arizona, Dakota, Idaho, Montana, New Mexico, Utah, Washington, and Wyoming. The act of March 3, 1891, amended the provisions of the former act and extended them to the State of Colorado. Still further amendments and additions, of general application, were made by the acts of March 28, 1908, April 30, 1912, and March 4, 1915. After the admission of the various Territories as States into the Union the desert lands therein remained subject to disposal in the same manner as before.

LANDS THAT MAY BE ENTERED AS DESERT LAND.

3. As the desert-land law requires the artificial irrigation of any land entered thereunder, lands which are not susceptible of irrigation by practicable means are not deemed subject to entry as desert lands. The question as to whether any particular tract sought to be entered as desert land is in fact irrigable from the source proposed by the applicant will be investigated and determined before the application for entry is allowed. (See paragraph 13 of this circular.) In order to be subject to entry under the desert-land law, public lands must be not only irrigable but also surveyed, unreserved, unappropriated, nonmineral, nontimbered, and such as will not, without artificial irrigation, produce any reasonably remunerative agricultural crop by the usual means or methods of cultivation. In this latter class are those lands which, one year with another for a series of years, will not without irrigation produce paying crops, but on which crops can be successfully grown in alternate years by means of the so-called dry-farming system. (37 L. D., 522, and 42 L. D., 524.)

Under the act of June 22, 1910 (36 Stat., 583), lands which have been withdrawn or classified as coal lands, or are valuable for coal, may, if desert in character as above defined, be entered under the desert-land law, provided such entry is made with a view to obtaining title with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. By the act of July 17, 1914 (38 Stat., 509), similar provisions are made with respect to all lands which have been withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits.

While lands which border upon streams, lakes, and other bodies of water, or through or upon which there is any stream or body of water may not produce agricultural crops without irrigation, satisfactory proof of their desert character must be furnished.

WHO MAY MAKE DESERT-LAND ENTRY.

4. Any citizen of the United States 21 years of age, or any person of that age who has declared his intention of becoming a citizen of the United States, and who can truthfully make the affidavit specified in paragraphs 8 and 9 of these regulations, can make a desert-land entry. Thus, a woman, whether married or single, who possesses the necessary qualifications can make a desert-land entry, and, if

married, without taking into consideration any entries her husband may have made.

The right of a woman to make a desert-land entry will, however, be affected by her marriage in so far as her citizenship is dependent upon that of her husband. Under the naturalization laws of the United States, a woman of alien birth who is married can not be naturalized in her own right, but her status with respect to citizenship is regarded as being at all times the same as that of her husband. Such a woman should therefore state in her declaration whether her husband is a native-born or a naturalized citizen of the United States, or has declared his intention to become naturalized, as the case may be. On the other hand, it is provided by the act of March 2, 1907 (34 Stat., 1228), that an American woman who marries a foreigner shall take the nationality of her husband. Any woman seeking to make desert-land entry must, therefore, state in her declaration whether she is married or single, and if married must give the date of her marriage, and if married since March 2, 1907, must state whether her husband is a native-born or a naturalized citizen of the United States, or has declared his intention to become a citizen; or, if the marital relation has ceased to exist, she may show that fact and, also, that she has resumed her American citizenship by one of the methods prescribed by the statute. However, a female citizen of the United States who, after making a desert-land entry, marries an alien who is entitled to become a citizen of the United States, may perfect title to the entered land by compliance with the desert-land laws, the same as if she had remained unmarried or had married a citizen of the United States, but proof of the husband's eligibility to citizenship must be supplied. (Act of Oct. 17, 1914, 38 Stat., 740; 43 L. D., 444.)

A certified copy of the certificate of naturalization, or declaration of intention, as the case may be, should accompany the application in every instance, where required by the foregoing rules.

At the time of making final proof, claimants of alien birth must have been admitted to full citizenship, but a certified copy of the final certificate of naturalization need not be furnished if it has already been filed in connection with the original declaration, or with the proof of an assignment of the entry.

QUANTITY OF LAND THAT MAY BE ENTERED.

5. Under the act of March 3, 1877, desert-land entries to the maximum of 640 acres were allowed, but by the act of March 3, 1891, the maximum area that may be embraced in a desert entry was reduced to 320 acres. This limitation must, however, be read in connection with the act of August 30, 1890 (26 Stat., 391), which limits to 320 acres, in the aggregate, the amount of land to which title may be acquired under all the public land laws, except the mineral laws. Hence, a person having initiated a claim under the homestead, timber and stone, preemption, or other agricultural land laws, or under all such laws, since August 30, 1890, say, to 160 acres in the aggregate, and acquired title to the land so claimed, or who is claiming such an area under subsisting entries at the date of his desert-land application, may, if otherwise qualified, enter 160 acres

of land under the desert-land laws. In other words, he may make a desert-land entry for such a quantity of land as, taken together with all land acquired and claimed by him under the other agricultural land laws since August 30, 1890, does not exceed 320 acres in the aggregate. It is to be noted, also, that the act of June 22, 1910 (36 Stat., 583), provides that desert-land entries made for lands withdrawn or classified as coal lands, or valuable for coal, shall not exceed 160 acres in area, and that a like restriction is made by the act of July 17, 1914 (38 Stat., 509), with reference to desert-land entries made for land withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or valuable for those deposits.

SECOND ENTRY

A person's right of entry under the desert-land law is exhausted either by making an entry or by taking an assignment of an entry, in whole or in part, whether the maximum quantity of land, or less, is entered or received by assignment; except, however, that under the act of September 5, 1914 (38 Stat., 712), if a person, otherwise duly qualified to make a desert-land entry, has previously made such entry or entries and through no fault of his own has lost, forfeited, or abandoned the same, such person may make another entry. In such case, however, it must be shown that the prior entry or entries were made in good faith, and were lost, forfeited, or abandoned because of matters beyond the applicant's control, and that the applicant has not speculated in his right, nor committed a fraud or attempted fraud in connection with such prior entry or entries. As the assignment of an entry involves no loss, forfeiture, or abandonment thereof, but carries a benefit to the assignor, it is held to exhaust his right of entry under the desert-land law. Hence, no person who has assigned such entry, in whole or in part, will be permitted thereafter to make another entry, or to take one or any part thereof by assignment. Applications to make second entry must not be allowed by the registers and receivers, but must be forwarded by them, with appropriate recommendations, to the General Land Office, accompanied by the applicant's affidavit giving data from which his former entry, or entries, may be identified (preferably its series and number, as well as a description of the tract by section, township, and range), and showing (a) what examination of the land and what inquiries as to its character he made prior to filing his previous application or applications for entry, and what reason he had to believe that the required proportion of the tracts could be reclaimed by him through irrigation; (b) what improvements he made upon the land, describing in detail their nature and cost, the date of his abandonment of the claim or claims and the reason therefor, and whether he ever executed a relinquishment of the entry or entries; and (c) what consideration, if any, he received for abandoning or relinquishing the entry or entries, and whether he sold the improvements thereon, giving full details as to such sale, if any, including the date thereof and the consideration received. This affidavit must be executed before a proper officer (see paragraph 11 of this circular) and must be corroborated on all matters susceptible of corroboration by at least one witness having knowledge of the facts; or, there may be several wit-

nesses, each testifying on some material point. The affidavits of the witnesses may be executed before any officer authorized to administer oaths and having an official seal.

If the Commissioner should find that the applicant is qualified to make a second entry, the application will be returned to the local officers for appropriate action in accordance with paragraph 13 of this circular.

LAND MUST BE IN COMPACT FORM.

6. Land entered under these laws should be in compact form, which means that it should be as nearly a square form as possible. Where, however, it is impracticable, on account of the previous appropriation of adjoining lands or on account of the topography of the country, to take the land in a compact form, all the facts regarding the situation, location, and character of the land sought to be entered and the surrounding tracts should be stated, in order that the General Land Office may determine whether, under all the circumstances, the entry should be allowed in the form sought. Entry-men should make a complete showing in this regard and should state the facts and not the conclusions they derive from the facts, as it is the province of the Land Department of the Government to determine whether or not, from the facts stated, the entry should be allowed. Under no circumstances, however, can one entry be made for two or more separate tracts or for two tracts which touch each other at only a single point.

HOW PREFERENCE RIGHT MAY BE ACQUIRED ON UNSURVEYED LAND.

7. Prior to the act of March 28, 1908, a desert-land entry could embrace unsurveyed lands, but since the date of that act desert-land entries may not be made of unsurveyed lands. This act provides, however, that any individual qualified to make entry of desert lands under the desert-land acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public-land surveys, within 90 days after the filing of the approved plat of survey in the district land office.

To preserve this preference right the work of reclamation must be continued up to the filing of the plat of survey, unless the reclamation of the land is completed before that time, and in that event the claimant must continue to cultivate and occupy the land until the survey is completed and the plat filed. A mere perfunctory occupation of the land, such as staking off the claim or posting notices thereof on the land claimed, will not secure the preference right as against an adverse claimant. While actual settlement and residence upon the land, as required under the homestead law, are not necessary, the possession and improvements must be such as to conform to the requirements of the desert-land law and must evidence good faith on the part of the claimant.

HOW TO PROCEED TO MAKE A DESERT-LAND ENTRY.

8. A person who desires to make entry under the desert-land laws must file with the register and receiver of the proper land office a declaration or application, under oath, showing that he is a citizen of the United States or has declared his intention to become such citizen; that he is 21 years of age or over; and that he is also a bona fide resident of the State in which the land sought to be entered is located. He must also state that he has not previously exercised the right of entry under the desert-land laws by making an entry or by having taken one by assignment; that he has personally examined every legal subdivision of the land sought to be entered; that he has not, since August 30, 1890, acquired title, under any of the agricultural-land laws, to lands which, together with the land applied for, will exceed, in the aggregate, 320 acres; and that he intends to reclaim the lands applied for by conducting water thereon within four years from the date of his application. This declaration must contain a description of the land by legal subdivisions, section, township, and range. If the application is made for lands withdrawn or classified as coal lands or for lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or valuable therefor, the applicant must also state in his declaration that the same is made in accordance with and subject to the act of June 22, 1910 (36 Stat., 588), or the act of July 17, 1914 (38 Stat., 509), as the case may be.

9. Special attention is called to the terms of this application, as they require a personal knowledge by the entryman of the lands intended to be entered. The affidavit, which is made a part of the application, may not be made by an agent or upon information and belief, and the register and receiver must reject all applications in which it is not made to appear that the statements contained therein are made upon the applicant's own knowledge, obtained from a personal examination of the land. The blank spaces in the application must be filled in with a complete statement of the facts, showing the applicant's acquaintance with the land and how he knows it to be desert land. This declaration must be corroborated by the affidavits of two reputable witnesses, who also must be personally acquainted with the land, and they must state the facts regarding the condition and situation of the land upon which they base the opinion that it is subject to desert entry. The declaration of applicant and the affidavit of his two witnesses must, in every instance, be made at the same time and place and before the same officer. (As to officers authorized to administer oaths in such cases, see par. 11 of this circular.)

The statements in the blank form of declaration and accompanying affidavits as to present character of the land may be modified so as to show the facts in any case wherein application is made for entry of lands reclaimed, or partially reclaimed, by applicant, before survey, under the provisions of the act of March 28, 1908; as to a former entry, in case application is made for a second entry under the provisions of the act of September 5, 1914; as to the character of the land with respect to coal deposits in case application is made under the provisions of the act of June 22, 1910, for lands withdrawn or classified as coal lands, or valuable for coal; and with respect to

phosphate, nitrate, potash, oil, gas, and asphaltic minerals in case application is made under the provisions of the act of July 17, 1914, for lands withdrawn, classified, or reported as containing those substances, or valuable therefor.

10. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their post-office addresses. It is not sufficient to name only the county or State in which a person lives, but the town or city must be named also; and where the residence is in a city, the street and number must be given. It is especially important to claimants that upon changing their post-office addresses they promptly notify the local officers of such change, for in case of failure to do so their entries may be canceled upon notice sent to the address of record but not received by claimant. The register and receiver will be careful to note the post-office address on their records.

11. The application and corroborating affidavits and all other proofs, affidavits, and oaths of any kind whatsoever required by law to be made by applicants and entrymen and their corroborating witnesses must be sworn to before the register or receiver of the land district in which the land is located, or before a United States commissioner, or a judge or clerk of a court of record, in the county or land district in which the land is situated. The only condition permitting the taking of such evidence outside the proper land district is where the county in which the land is situated lies partly in two or more land districts, in which case such evidence may be taken anywhere in the county. In case any application, affidavit, proof, or oath above mentioned be taken outside the county wherein the land lies, then, unless it was taken before the proper register or receiver, the applicant or entryman must show by his affidavit that the qualified officer employed was the one whose place of business, *in the land district*, is nearest to or most accessible from the land in question. (Act of Mar. 4, 1904, amending sec. 2294, U. S. Rev. Stat., 33 Stat., 59.) As to *final proofs* made outside the county embracing the land, but in the town or city where the proof notice is published, see paragraph 22 hereof.

EVIDENCE AS TO WATER RIGHT MUST ACCOMPANY APPLICATION.

12. No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right. If applicant intends to procure water from an irrigation district, corporation, or association, but is unable to obtain a contract for the water in advance of the allowance of his entry, then he must furnish, in lieu of the contract, some written assurance from the responsible officials of such district, corporation, or association that, if his entry be allowed, applicant will be able to obtain from that source the necessary water. All applications not accompanied by the evidence above indicated will be rejected.

PROPOSED IRRIGATION SYSTEM MUST BE PRACTICABLE.

13. At the time of filing the declaration with the register and receiver the applicant must also file plans describing in detail the following: Source of water supply; character of the irrigation works constructed, in course of construction, or proposed to be constructed, i. e., reservoirs for storage, canals, flumes, or other method by which water is to be conserved and conveyed to the land; if by direct diversion, the character and volume of the flow of the streams or springs, whether perennially flowing or intermittent. If the works have not been constructed, it must be shown whether they are to be built by an irrigation district, a corporation, or an association, and a general description of the proposed plan must be furnished. It must be shown in connection with any proposed plan whether, and by whom, surveys and investigations have been made which demonstrate the existence of a sufficient water supply and the feasibility of the proposed works to convey water to the land. If the applicant individually, or in association with others, proposes to construct irrigation works, a sworn statement must accompany the declaration, containing a general description of the proposed works, an estimate of the cost, and such other data as will enable the register and receiver and the Department to determine the sufficiency of the water supply and the feasibility of the proposed works to convey water to the lands to be irrigated. If the irrigation is proposed by means of artesian wells or by pumping from nonartesian underground sources of water supply, sworn evidence must be submitted as to the existence of such water supply upon or near the land involved, including a statement as to other wells theretofore sunk and affording a water supply to adjoining or near-by lands.

With respect to the land itself, a specific showing must be submitted as to its approximate altitude, character of the soil, and to what points upon the tract the ditches or laterals are to be extended; and that the land is of such contour that it can be irrigated from the proposed system. The map required to be filed by section 4 of the act of March 3, 1891 (26 Stat., 1095), must be sufficiently definite and accurate (preferably, but not necessarily, prepared by a licensed engineer) to show the plan for conducting water to the land to be irrigated. The register and receiver will carefully examine the evidence submitted in such declarations, and either reject defective declarations or require additional evidence to be filed.

At the time of filing his declaration, plans, and the statements submitted therewith, the applicant must pay the receiver the sum of 25 cents per acre for the lands therein described, the declaration to be given its proper serial number at that time, in accordance with existing regulations. No rights to the land are initiated by the filing of an application unless this sum is paid or tendered. The receiver will issue a receipt for the money, and after proper notations have been made on the local office records the application will be transmitted to the proper Chief of Field Division for report as to the sufficiency of the alleged water supply and the feasibility of the proposed plans. The register and receiver will report to the Chief of Field Division any facts in their knowledge with respect to the land, the water supply, or the proposed plan of irrigation, including the financial responsibility and general ability of the irrigation districts,

corporations, or associations which propose to construct works for the reclamation of such land. In all cases the register and receiver will certify as to the status of the lands as shown by their records, and when forwarding an application for report they will attach all papers filed by the applicant. No application will be forwarded to the Chief of Field Division until all evidence required as aforesaid has been furnished by the applicant; nor, in the case of an application for second entry, until the application has been returned to the local officers after consideration by the Commissioner.

When an application is received by the Chief of Field Division he will have same considered by a field examiner, who will make a written report thereon recommending the allowance or rejection of the application. If such report is favorable, and the Chief of Field Division is of the opinion that the entry should be allowed, he will return the application to the register and receiver with the report and recommendation to that effect, whereupon the register and receiver will pass upon it in regular order in the light of the report, which is to be attached to the application and become a part of the record, and, in the absence of any objection, will sign the certificate at the end of the declaration under date of its allowance, and advise the applicant.

If, however, the Chief of Field Division is of the opinion that the entry should not be allowed, he will have a full report prepared on the application and transmit the entire record to the General Land Office for consideration and action, advising the register and receiver thereof.

In the event that an applicant alleges a company, an association, or an irrigation district as the proposed source of water supply, upon which report has not been submitted, the Chief of Field Division will cause an investigation to be made of such project and have a report submitted thereon to the Commissioner, making a definite recommendation as to the allowance of original entries under the project, and will transmit the application involved with the report.

If the project alleged as the source of water supply has been reported upon, but no action on such report has been taken by the Commissioner, the Chief of Field Division will transmit the application to the General Land Office with appropriate recommendation. In the event the applicant alleges a project which has been passed upon by the Commissioner, the Chief of Field Division will consider same in accordance with the conclusions reached, and, in the event that favorable action is warranted, will return the papers to the register and receiver with proper report and recommendation. In case adverse action is necessary the Chief of Field Division will transmit the application to the General Land Office with proper recommendation.

Should the Commissioner, after consideration of the examiner's report and the showing made by the applicant, deny the right to make entry, the applicant will be allowed the right to apply for a hearing or to appeal, as he may desire.

If an application is not returned by the Chief of Field Division in time to be considered and allowed by the register and receiver and transmitted with the returns for the month during which filed, the register will note "To C. F. D." (giving date) in the remarks

column of the "General Schedule of Serial Numbers," and will forward with the returns for that month a separate report, on Form 4-030, for each application so held by the Chief of Field Division.

Registers and receivers will render any reasonable assistance to applicants and witnesses in preparing their declarations and affidavits, but it is no part of the duty of these officers to prepare, or assist in preparing the map, plans, or evidence of water right required to be filed with the declaration. Intending applicants should cause all such documents and papers to be prepared in advance and have them ready for filing with the declarations.

ASSIGNMENTS.

14. While by the act of March 3, 1891, assignments of desert-land entries were recognized, the Land Department, largely for administrative reasons, held that a desert-land entry might be assigned as a whole, or in its entirety, but refused to recognize the assignment of only a portion of an entry. The act of March 28, 1908, however, provides for an assignment of such entries, in whole or in part, but this does not mean that less than a legal subdivision may be assigned, or that an entry may be thus divided otherwise than by the lines of legal subdivisions, or into two or more non-contiguous portions. (With regard to the assignment of desert-land entries within Government reclamation projects, see General Reclamation Circular.)

15. The act of March 28, 1908, also provides that no person may take a desert-land entry by assignment, unless he is qualified to enter the tract so assigned to him. Therefore, if a person is not at least 21 years of age and a resident citizen of the State wherein the land involved is located; or if he is not a citizen of the United States, or a person who has declared his intention to become a citizen thereof; or, if he has made a desert-land entry in his own right and is not entitled, under the act of September 5, 1914, to make a second entry, he can not take such an entry by assignment. The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment, unless it be done as the exercise of a right of second entry. The right of entry under the desert-land law is exhausted either by making an entry or by taking one by assignment, unless such entry be subsequently lost, forfeited, or abandoned because of matters beyond the claimant's control.

A person who has the right to make a second desert-land entry under the act of September 5, 1914, may exercise that right by taking an assignment of a desert-land entry, or part of such entry, if he is otherwise qualified to make a desert-land entry for the particular tract assigned. The right to make a second desert-land entry, however, is not possessed by any person who has assigned some former entry, or part thereof. (See par. 5.)

The act of March 28, 1908, also provides that no assignment to, or for the benefit of, any corporation shall be authorized or recognized.

16. As stated above, desert-land entries may be assigned, in whole or in part, and as evidence of the assignment, there should be transmitted to the General Land Office the original deed of assignment, or a certified copy thereof. Where the deed of assignment is recorded,

a certified copy may be made by the officer who has custody of the record. Where the original deed is presented to an officer qualified to take proof in desert-land cases, a copy certified by such officer will be accepted. Attention is called to the fact that copies of deeds of assignment certified by notaries public or justices of the peace, or, indeed, any other officer than those who are qualified to take proofs and affidavits in desert-land cases, will not be accepted.

An assignee must file, with his deed of assignment, an affidavit (Form 4-274c) showing his qualifications to take the entry assigned to him. He must show what entries, if any, have been made by him or assigned to him under the agricultural public-land laws, and he must also show his qualifications as a citizen of the United States, that he is 21 years of age or over, and also that he is a resident citizen of the State in which the land assigned to him is situated. If the assignee is not a native-born citizen of the United States, he should also furnish a certified copy of his declaration of intention to become a citizen, or a certified copy of his final naturalization paper, as the case may be. If the assignee is a woman, she should in all cases state whether or not she is married, and if so show that, in accordance with the rules explained in paragraph 4, her citizenship is not lost by reason of the alienage of her husband. In short, the assignee must prove that he possesses all the qualifications necessary to enable him to make a desert-land entry for the land proposed to be assigned, were it subject to entry. Desert-land entries are initiated by the payment of 25 cents per acre, and no assignable right is acquired by the applicant prior to such payment. (6 L. D., 541; 33 L. D., 152.) An assignment made on the day of such payment, or soon thereafter, is treated as suggesting fraud, and such cases will be carefully scrutinized. The provisions of law authorizing the assignment of desert entries, in whole or in part, furnish no authority to a claimant under said law to make an executory contract to convey the land after the issuance of patent and thereafter to proceed with the submission of final proof in furtherance of such contract. (34 L. D., 383.) The sale of land embraced in an entry at any time before final payment is made must be regarded as an assignment of the entry, and in such cases the person buying the land must show that he possesses all the qualifications required of an assignee. (29 L. D., 453.) The assignor of a desert-land entry may execute the assignment before any officer authorized to take acknowledgements of deeds, but the assignee must execute the affidavit as to his qualifications (Form 4-274c) and all other required oaths and affidavits before some one of the officers specified in paragraph 11 of this circular.

No assignments of desert-land entries or parts of entries are conclusive until examined in the General Land Office and found satisfactory and the assignment recognized. When recognized, however, the assignee takes the place of the assignor as effectually as though he had made the entry, and is subject to any requirement that may be made relative thereto. The assignment of a desert-land entry to one disqualified to acquire title under the desert-land law, and to whom, therefore, recognition of the assignment is refused by the General Land Office, does not of itself render the entry fraudulent, but leaves the right thereto in the assignor. In such connection, however, see 42 L. D., 90.

After final proof and payment have been made the land may be sold and conveyed to another person without the approval of the General Land Office, but all such conveyances are nevertheless subject to the superior rights of the United States, and the title so obtained would fail if it should be finally determined that the entry was illegal or that the entryman had failed to comply with the law.

Lands embraced in unperfected desert-land entries are not subject to taxation by the State authorities, nor to levy and sale under execution to satisfy judgments against the entrymen. A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereon and not as a conveyance thereof. The purchaser at a sale had for the foreclosure of such mortgage may be recognized as assignee upon furnishing proof of his qualifications to take a desert-land entry by assignment. Transferees after final proof, mortgagees, or other encumbrancers may file in the proper local land office written notice stating the nature of their claims, and they will thereupon become entitled to receive notice of any action taken by the Land Department with reference to the entry. The register and receiver will report all such claims by separate letters, to be forwarded with their current returns to the General Land Office.

ANNUAL PROOF.

17. In order to test the sincerity and good faith of claimants under the desert-land laws and to prevent the segregation for a number of years of public lands in the interest of persons who have no intention to reclaim them, Congress, in the act of March 3, 1891, made the requirement that a map be filed at the initiation of the entry showing the mode of contemplated irrigation and the proposed source of the water supply, and that there be expended yearly for three years from the date of the entry not less than \$1 for each acre of the tract entered, making a total of not less than \$3 per acre, in the necessary irrigation, reclamation, and cultivation of the land, in permanent improvements thereon, and in the purchase of water rights for the irrigation thereof, and that at the expiration of the third year a map or plan be filed showing the character and extent of the improvements placed on the claim. Said act, however, authorizes the submission of final proof at an earlier date than four years from the time the entry is made in cases wherein reclamation has been effected and expenditures of not less than \$3 per acre have been made. Proof of these expenditures must be made before some officer authorized to administer oaths in public-land cases. (See par. 11 hereof.) This proof, which is known as yearly or annual proof, must consist of the affidavits of "two or more credible witnesses," each of whom must have personal knowledge that the expenditures were made for the purpose stated in the proof. The testimony of such witnesses may be supplemented by the affidavit of the claimant, at his option, but he is not required by law to make oath as to the annual expenditures upon or for the benefit of the land. (42 L. D., 165.) Annual proofs must contain itemized statements showing the manner in which expenditures were made.

ACCEPTABLE EXPENDITURES.

18. Expenditures for the construction and maintenance of storage reservoirs, dams, canals, ditches, and laterals to be used by claimant for irrigating his land; for roads where they are necessary; for erecting stables, corrals, etc., for digging wells, where the water therefrom is to be used for irrigating the land; and for leveling and bordering land proposed to be irrigated, will be accepted. Expenditures for fencing all or a portion of the claim, for surveying for the purpose of ascertaining the levels for canals, ditches, etc., and for the first breaking or clearing of the soil are also acceptable.

EXPENDITURES NOT ACCEPTABLE.

Expenditures for cultivation after the soil has been first prepared may not be accepted, because the claimant is supposed to be compensated for such work by the crops to be reaped as a result of cultivation. Expenditures for surveying the claim in order to locate the corners of same may not be accepted. The cost of tools, implements, wagons, and repairs to same, used in construction work, may not be computed in cost of construction. Expenditures for material of any kind will not be allowed unless such material has actually been installed or employed in and for the purpose for which it was purchased. For instance, if credit is asked for posts and wire for fences or for pump or other well machinery, it must be shown that the fence has been actually constructed or the well machinery actually put in place. No expenditures can be credited on annual proofs upon a desert-land entry unless made on account of that particular entry; and expenditures once credited can not be again applied. This rule applies to second entries as well as to original entries, and a claimant who relinquishes his entry and makes second entry of the same land under the act of September 5, 1914, can not receive credit on annual proofs upon the second entry for expenditures made on account of the former entry. (41 L. D., 601, and 42 L. D., 523.)

No expenditure for stock or interest in an irrigation company, through which water is to be secured for irrigating the land, will be accepted as satisfactory annual expenditure until a special agent, or other authorized officer, has submitted a report as to the resources and reliability of the company, including its actual water right, and such report has been favorably acted upon by the General Land Office. The stock purchased must carry the right to water, and it must be shown that payment in cash has been made at least to the extent of the amount claimed as expenditure for the purchase of such stock in connection with the annual proof submitted, and such stock must be actually owned by the claimants at the time of the submission of final proof.

Registers and receivers are instructed to examine carefully all annual proofs filed and are authorized to suspend them, with notice to claimants to cure defects within 30 days, or to reject them, subject to the usual right of appeal to the Commissioner of the General Land Office. These proofs are to be forwarded with the regular monthly returns. However, no annual proof which alleges an expenditure for stock or interest in an irrigation company should be rejected merely because the expenditure was of that character, unless such

rejection be warranted under instructions issued by the Commissioner of the General Land Office in acting upon the special agent's report on the particular company in question. If no such instructions have been issued, and the company referred to in the annual proof be one on which the local officers have not previously requested a report from the proper Chief of Field Division, they will immediately call for such report, and advise the Commissioner thereof by special letter. They will also indorse the fact and date of the call upon the margin of the annual proof and forward it to the General Land Office with the regular returns.

NOTICE TO DELINQUENT CLAIMANTS.

Local officers will examine their records frequently for the purpose of ascertaining whether all annual proofs due on pending desert-land entries have been made, and in every case where the claimant is in default in that respect they will send him notice and allow him 60 days in which to submit such proof. If the proof is not furnished as required, the fact that notice was served upon the claimant should be reported to the General Land Office, with evidence of service, whereupon the entry will be canceled. Said officers should keep on hand a sufficient supply of blank forms used in notifying the entrymen that annual proofs are due, and they should send such notices whenever necessary, without waiting for instructions from the General Land Office. During the pendency of a government proceeding initiated by such notice the entry will be protected against a private contest charging failure to make the required expenditures, and such contest will neither defeat the claimant's right to equitably perfect the entry as to the matter of expenditures during the 60 days allowed in the notice nor secure to the contestant a preference right in event the entry be canceled for default under said notice.

EXTENSION OF TIME FOR FILING ANNUAL PROOF NOT ALLOWED.

The law makes no provision for an extension of time in which to file annual proof on desert-land entries not embraced within the exterior boundaries of any land withdrawal or irrigation project under the reclamation act of June 17, 1902 (32 Stat., 388), and extensions for said purpose can not, therefore, be granted. However, where a township is suspended from entry for the purpose of resurvey thereof, the time between the date of suspension and the filing in the local office of the new plat of survey will be excluded from the period accorded by law for the reclamation of land under a desert entry within such township and the statutory life of the entry extended accordingly. (40 L. D., 223.) During the continuance of the extension the claimant may, at his option, defer the making of annual expenditures and proof thereof.

19. Nothing in the statutes or regulations should be construed to mean that the entryman must wait until the end of the year to submit his annual proof, because the proof may be properly submitted as soon as the expenditures have been made. Proof sufficient for the three years may be offered whenever the amount of \$3 an acre has been expended in reclaiming and improving the land, and thereafter annual proof will not be required.

FINAL PROOF.

20. The entryman, his assigns, or, in case of death, his heirs or devisees, are allowed four years from date of the entry within which to comply with the requirements of the law as to reclamation and cultivation of the land and to submit final proof, but final proof may be made and patent thereon issued as soon as there has been expended the sum of \$3 per acre in improving, reclaiming, and irrigating the land, and one-eighth of the entire area entered has been properly cultivated and irrigated, and when the requirements of the desert-land laws as to water rights and the construction of the necessary reservoirs, ditches, dams, etc., have been fully complied with.

NOTICE OF INTENTION TO MAKE FINAL PROOF.

When an entryman has reclaimed the land and is ready to make final proof, he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land, give the number of the entry and name of the claimant, and must bear an indorsement specifically indicating the source of his water supply. If the proof is made by an assignee, his name, as well as that of the original entryman, should be stated. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in this notice, two of whom must be used in making proof. Care should be exercised to select as witnesses persons who are familiar, from personal observation, with the land in question, and with what has been done by the claimant toward reclaiming and improving it. Care should also be taken to ascertain definitely the names and addresses of the proposed witnesses, so that they may correctly appear in the notice.

PUBLICATION OF FINAL-PROOF NOTICE.

21. This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land (see 38 L. D., 131), and it must also be posted in a conspicuous place in the local land office for the same period of time. The claimant must pay the cost of the publication, but it is the duty of registers to procure the publication of proper final-proof notices, and registers should accordingly exercise the utmost care in that behalf. (40 L. D., 459.) The date fixed for the taking of the proof must be at least 30 days after the date of first publication. Proof of publication must be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

22. On the day set in the notice (or, in the case of accident or unavoidable delay, within 10 days thereafter) and at the place and before the officer designated, the claimant will appear with two of the witnesses named in the notice and make proof of the reclamation, cultivation, and improvement of the land. The testimony of each claimant should be taken separately and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separately and apart from and not within the hearing of either the applicant or of any other witness, and both

the applicant and each of the witnesses should be required to state, in and as a part of the final-proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others. In every instance where, for any reason whatever, final proof is not submitted within the four years prescribed by law, or within the period of an extension granted for submitting such proof, an affidavit should be filed by claimant, with the proof, explaining the cause of delay.

OFFICERS QUALIFIED TO TAKE FINAL PROOF.

The final proof may be made before any one of the officers named in paragraph 11 of this circular. If not made before the register or receiver, then the proof must, subject to the exceptions noted in said paragraph, be made in the county and the land district in which the entered land is located. However, final proof may be made outside the county in which the land is located provided it be made within the proper land district and in the town or city at which the newspaper publishing the proof notice is printed, and in such case the claimant need not show by affidavit that the officer taking the proof is the one nearest to or most accessible from the land. (Act Mar. 4, 1904, 33 Stat., 59.)

SHOWING REQUIRED ON FINAL PROOF AS TO IRRIGATION, CULTIVATION, AND WATER RIGHTS.

23. The final proof must show specifically the source and volume of the water supply and how it was acquired and how it is maintained. The number, length, and carrying capacity of all ditches to and on each of the legal subdivisions must also be shown. The claimant and the witnesses must each state in full all that has been done in the matter of reclamation and improvement of the land, and must answer fully, of their own personal knowledge, all of the questions contained in the final-proof blanks. They must state plainly whether at any time they saw the land effectually irrigated, and the different dates on which they saw it irrigated should be specifically stated.

24. While it is not required that all of the land shall have been actually irrigated at the time final proof is made, it is necessary that the one-eighth portion which is required to be cultivated shall also have been irrigated in a manner calculated to produce profitable results, considering the character of the land, the climate, and the kind of crops being grown. (Alonzo B. Cole, 38 L. D., 420.) The cultivation and irrigation of the one-eighth portion of the entire area entered may be had in a body on one legal subdivision or may be distributed over several subdivisions. The final proof must clearly show that all of the permanent main and lateral ditches necessary for the irrigation of all the irrigable land in the entry have been constructed so that water can be actually applied to the land as soon as it is ready for cultivation. If pumping be relied upon as the means of irrigation, the plant installed for that purpose must be of sufficient capacity to render available enough water for all the irrigable land. If there are any high points or any portions of the land which for any reason it is not practicable to irrigate, the nature, extent, and

situation of such areas in each legal subdivision must be fully stated. If less than one-eighth of a smallest legal subdivision is practically susceptible of irrigation from claimant's source of water supply, and no portion thereof is used as a necessary part of his irrigation scheme, such subdivision must be relinquished. (43 L. D., 269.)

25. As a rule, actual tillage of one-eighth of the land must be shown. It is not sufficient to show only that there has been a marked increase in the growth of grass, or that grass sufficient to support stock has been produced on the land, as a result of irrigation. If, however, on account of some peculiar climatic or soil conditions, no crops except grass can be successfully produced, or if actual tillage will destroy or injure the productive quality of the soil, the actual production of a crop of hay, of merchantable value, will be accepted as sufficient compliance with the requirements as to cultivation (32 L. D., 456). In such cases, however, the facts must be stated, and the extent and value of the crop of hay must be shown, and, as before stated, that same was produced as a result of actual irrigation.

26. In every case where the claimant's water right is founded upon contract or purchase the final proof must embrace evidence which clearly establishes the fact and legal sufficiency of that right. If claimant's ownership of such right has already been evidenced in connection with the original entry or some later proceeding, then the final proof must show his continued possession thereof. If the water right relied on is obtained under claimant's appropriation, the final proof, considered together with any evidence previously submitted in the matter, must show that the claimant has made such preliminary filings as are required by the laws of the State in which the land is located, and that he has also taken all other steps necessary under said laws to secure and perfect the claimed water right. In all cases the water right, however it be acquired, must entitle the claimant to the use of a sufficient supply of water to irrigate successfully all the irrigable land embraced in his entry, notwithstanding that the final proof need only show the actual irrigation of one-eighth of that area.

In those States where entrymen have made applications for water rights and have been granted permits, but where no final adjudication of the water right can be secured from the State authorities, owing to delay in the adjudication of the water courses or other delay for which the entrymen are in no way responsible, proof that the entrymen have done all that is required of them by the laws of the State, together with proof of actual irrigation of one-eighth of the land embraced in their entries, may be accepted. This modification of the rule that the claimant must furnish evidence of an absolute water right will apply only in those States where, under the local laws, it is impossible for the entryman to secure final evidence of title to his water right within the time allowed him to submit final proof on his entry, and in such cases the best evidence obtainable must be furnished. (35 L. D., 305.)

It is a well-settled principle of law in all of the States in which the desert-land acts are operative that actual application to a beneficial use of water appropriated from public streams measures the extent of the right to the water, and that failure to proceed with reasonable diligence to make such application to beneficial use within a reasonable time constitutes an abandonment of the right. (Wiel's

Water Rights in the Western States, sec. 172.) The final proof, therefore, must show that the claimant has exercised such diligence as will, if continued, under the operation of this rule, result in his definitely securing a perfect right to the use of sufficient water for the permanent irrigation and reclamation of all of the irrigable land in his entry. To this end the proof must at least show that water, which is being diverted from its natural course and claimed for the specific purpose of irrigating the lands embraced in claimant's entry, under a legal right acquired by virtue of his own or his grantor's compliance with the requirements of the State laws governing the appropriation of public waters, has actually been conducted through claimant's main ditches to and upon the land; that one-eighth of the land embraced in the entry has been actually irrigated and cultivated; that water has been brought to such a point on the land as to readily demonstrate that the entire irrigable area may be irrigated from the system; and that claimant is prepared to distribute the water so claimed over all of the irrigable land in each smallest legal subdivision in quantity sufficient for practical irrigation as soon as the land shall have been cleared or otherwise prepared for cultivation. The nature of the work necessary to be performed in and for the preparation for cultivation of such part of the land as has not been irrigated should be carefully indicated, and it should be shown that the said work of preparation is being prosecuted with such diligence as will permit of beneficial application of appropriated water within a reasonable time.

Desert-land claimants should bear in mind that a water right and a water supply are not the same thing, and that the two are not always or necessarily found together. Strictly speaking, a perfect and complete water right for irrigation purposes is confined to and limited by the area of land that has been irrigated with the water appropriated thereunder. Under the various State laws, however, an inchoate or incomplete right may be obtained which is capable of ripening into a perfect right if the water is applied to beneficial use with reasonable diligence. A person may have an apparent right of this kind for land which he has not irrigated and which, moreover, he never can irrigate because of the lack of available water to satisfy his apparent right. Such an imperfect right, of course, can not be viewed as meeting the requirements of the desert-land law which contemplates the eventual reclamation of all the irrigable land in the entry. Therefore, and with special reference to that portion of the irrigable land of an entry not required to be irrigated and cultivated before final proof, an incomplete (though real) water right will not be acceptable if its completion appears to be impossible because there is no actual supply of water available under the appropriation in question.

27. Where the water right claimed in any final proof is derived from an irrigation project it must be shown that the entryman owns such an interest therein as entitles him to receive from the irrigation works of the project a supply of water sufficient for the proper irrigation of the land embraced in his entry. Investigations by field agents as to the resources and reliability, including particularly the source and volume of the water supply, of all irrigation companies, associations, and districts through which desert-land entrymen seek to acquire water rights for the reclamation of their lands are being

made as rapidly as possible, and it is the purpose of the General Land Office to accept no annual or final proofs based upon such a water right until an investigation of the company in question has been made and report thereon approved. The information so acquired will be regarded as determining, at least tentatively, the amount of stock or interest which is necessary to give the entryman a right to a sufficient supply of water; but the entryman will be permitted to challenge the correctness of the report as to the facts alleged and the validity of its conclusions and to offer, either with his final proof or subsequently, such evidence as he can tending to support his contentions.

Entrymen applying to make final proof are required to state the source of their water supply, and if water is to be obtained from the works of an irrigation company, association, or district, the local officers will indorse the name and address of the project upon the copy of the notice to be forwarded to the Chief of Field Division. If the report on the company has been acted upon by the General Land Office and the proof submitted by claimant does not show that he owns the amount of stock or interest in the company found necessary for the area of land to be reclaimed, the local officers will suspend the proof, advise the claimant of the requirements made by the General Land Office in connection with the report, and allow him 30 days within which to comply therewith, or to make an affirmative showing in duplicate and apply for a hearing. In default of any action by him within the specified time they will reject the proof, subject to the usual right of appeal. If application for hearing be filed, the local officers will transmit one copy thereof to the proper Chief of Field Division and forward the other copy, with the final proof record, to the General Land Office.

FINAL PROOF EXPIRATION NOTICE.

28. Where final proof is not made within the period of four years, or within the period for which an extension of time has been granted, the register and receiver should send the claimant a notice, addressed to him at his latest post-office address of record, informing him that he will be allowed 90 days in which to submit final proof. Should no action be taken within the time allowed, the register and receiver will report that fact, together with evidence of service, to the General Land Office, whereupon the entry will be canceled. The notice provided for in this paragraph must not be construed as an extension of time, or as relieving the claimant from the necessity of explaining why the proof was not made within the statutory period, or within such extensions of that period as have been specifically granted.

FINAL PROOF NOT REQUIRED WHILE TOWNSHIP IS SUSPENDED FOR RESURVEY, BUT MAY BE SUBMITTED AT CLAIMANT'S OPTION.—PROCEDURE.

No claimant will be required to submit final proof while the township embracing his entry is under suspension for the purpose of resurvey. (40 L. D., 223.) This also applies to annual proof. (See par. 18.) In computing the time when final proof on an entry so affected will become due, the period between the date of suspension and the filing in the local office of the new plat of survey will be

excluded. However, if the claimant so elects, he may submit final proof on such entry, notwithstanding the suspension of the township. If submitted, the final proof will be received by the local officers, who will pursue the same course in regard thereto that would have been pursued in the absence of the suspension. Should final certificate be issued on any such proof, it will describe the entered land in terms of the original survey, with reference to the plat of such survey and to the fact of a pending resurvey, as follows:

In accordance with official plat of survey approved -----; resurvey now pending under group No. ----, G. L. O.; authorization dated -----.

Patent will not be granted on such a final certificate, however, until the resurvey has been completed and approved, after which the certificate will be amended to describe the land by its resurveyed description.

In all cases where an entry has been perfected by final proof and right to title established before suspension of a township plat of survey, such entry will be approved for patent and patent granted regardless of and notwithstanding such suspension. In all such cases, however, the final certificate will be amended, on its face, in such manner as to make appropriate reference to the resurvey proposed or in progress, following the form above prescribed for use in cases where proof is made after suspension. (See Circular 369, dated Dec. 28, 1914.)

EXTENSION OF TIME FOR SUBMITTING FINAL PROOF.

29. There are four general acts of Congress which authorize the allowance, under certain conditions, of an extension of time for the submission of final proof by a desert-land claimant. Said acts are the following: June 27, 1906 (34 Stat., 519, sec. 5); March 28, 1908 (35 Stat., 52, sec. 3); April 30, 1912 (37 Stat., 106); and March 4, 1915 (38 Stat., 1138-1161, sec. 5). The act of June 27, 1906, is applicable only to entries embraced within the exterior limits of some land withdrawal or irrigation project under the reclamation act of June 17, 1902 (32 Stat., 388). For regulations governing extensions under said act of June 27, 1906, see General Reclamation Circular. The act of March 4, 1915, is applicable only to entries made prior to July 1, 1914, and while authorizing in certain cases an additional extension to claimants who have had one or more extensions under previous laws, this act denies any extension, under its terms, to claimants who can obtain such benefit under prior acts. For regulations governing extensions under the act of March 4, 1915, see paragraphs 34 to 36 of this circular.

30. Under the provisions of the act of March 28, 1908, the period of four years may be extended, in the discretion of the Commissioner of the General Land Office, for an additional period not exceeding three years, if, by reason of some unavoidable delay in the construction of the irrigating works intended to convey water to the land, the entryman is unable to make proof of reclamation and cultivation required within the four years. This does not mean that the period within which proof may be made will be extended as a matter of course for three years. The statute authorizes the Commissioner of the General Land Office to grant the extension, in his discretion, for such a period as he may deem necessary for the

completion of the reclamation, not exceeding three years, but applications for extension under said act will not be granted unless it be clearly shown that the failure to reclaim and cultivate the land within the regular period of four years was due to no fault on the part of the entryman, but to some unavoidable delay in the construction of the irrigation works, for which he was not responsible and could not have readily foreseen. (37 L. D., 332.) It must also appear that he has complied with the law as to annual expenditures and proof thereof.

Under the provisions of the act of April 30, 1912, the Secretary of the Interior may, in his discretion, in addition to the extension authorized by previous legislation, grant to any entryman under the desert-land laws a further extension of time for submitting final proof, not exceeding three years, where it is shown that, because of some unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry, the claimant is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands within the time limited therefor, but such further extension can not be granted for a period of more than three years, nor affect contests initiated for a valid existing reason. Said act also provided:

That the total extension of the statutory period for making final proof that may be allowed in any one case, under this act, and any other existing statutes of either general or local application, shall be limited to six years in the aggregate.

An entryman who has complied with the law as to annual expenditures and proof thereof and who desires to make application for extension of time under the provisions of the act of March 28, 1908, should file with the register and receiver an affidavit setting forth fully the facts, showing how and why he has been prevented from making final proof of reclamation and cultivation within the regular period. This affidavit should be executed before one of the officers named in paragraph 11 of this circular, and must be corroborated by two witnesses who have personal knowledge of the facts, and the register and receiver, after carefully considering all of the facts, will forward the application to the General Land Office, with appropriate recommendation.

The register and receiver are required to suspend any application for extension of time if they consider the affidavits defective in form or substance, allowing the applicant a reasonable time to make such amendments therein as may be deemed necessary to remove the defects, or to file exceptions to the requirements made, and advising the applicant that upon his failure to take any action within the time specified, appropriate recommendations will be made. After the expiration of the time thus granted, the original application and the amended affidavits, or exceptions, as the case may be, together with proper report and recommendations of the register and receiver, will be transmitted to the General Land Office for consideration. Inasmuch as registers and receivers reside in their respective districts, they are presumed to have more or less personal knowledge of the conditions existing therein, and for that reason much weight will be given their recommendations.

Applications for further extension of time under the act of April 30, 1912, may be made in the same manner, and the same procedure

will be followed with respect to such applications as under the act of March 28, 1908.

PROCEDURE ON APPLICATIONS FOR EXTENSION OF TIME FOR FINAL PROOF WHERE CONTEST IS PENDING.

31. All applications for extension of time in which to make final proof will be transmitted in due course to the General Land Office, regardless of whether or not a contest has been filed against the entry to which any such application relates. If contest has been filed, the local officers will, in their letter of transmittal, make appropriate reference to its pendency. Consideration by the General Land Office of an application for extension of time will not be deferred because of the pendency of a contest against the entry in question unless the contest charges be sufficient, if proven, to negative the right of the entryman to an extension of time for making final proof. If the contest charges be insufficient, the application for extension, where regular in all respects, will be allowed and the contest dismissed subject to the right of appeal, but without prejudice to the contestant's right to amend his charges. (See Circular 174, dated Sept. 27, 1912.)

PAYMENTS—FEES.

32. At the time of making final proof the claimant must pay to the receiver the sum of \$1 per acre for each acre of land upon which proof is made. This, together with the 25 cents per acre paid at the time of making the original entry, will amount to \$1.25 per acre, which is the price to be paid for all lands entered under the desert-land law, except where the entry is perfected by commutation or purchase under the act of March 4, 1915. (See pars. 42 and 48 of this circular.) The receiver will issue a receipt for the money paid, and if the proof is satisfactory, the register will issue a certificate in duplicate and deliver one copy to the entryman and forward the other copy to the General Land Office at the end of the month during which the certificate was issued.

If the entryman is dead and proof is made by anyone for the heirs, no will being suggested in the record, the final certificate should issue to the heirs generally, without naming them; if by anyone for the heirs or devisees, final certificate should issue in like manner to the heirs or devisees.

When final proof is made on an entry made prior to the act of March 28, 1908, for unsurveyed land, if the land is still unsurveyed and such proof is satisfactory, the register and receiver will approve same and forward it to the General Land Office without collecting the final payment of \$1 an acre and without issuing final certificate. Fees for reducing the final-proof testimony to writing should be collected and receipt issued therefor if the proof is taken before the register and receiver. As soon as the plat or plats of any township or townships previously unsurveyed are filed in the local offices the registers and receivers will, without awaiting further instructions from the General Land Office, examine their records for the purpose of determining, if possible, whether or not, prior to the passage of the act of March 28, 1908, any desert-land entry of unsurveyed land

was allowed in the locality covered by the said plats; and if any such entries are found intact, they will call upon the claimants thereof to file an affidavit of adjustment, corroborated by two witnesses, giving the correct description, in accordance with the survey of the lands embraced in their respective entries. The local officers will then note these adjustments on their tract books and plats and transmit the affidavits to the General Land Office, with separate reports of all conflicts which may have been developed. They will also report any case in which the claimant has failed, after due notice, to file the required affidavit of adjustment.

If final proof has been made upon any desert-land entry so adjusted and the records show that such proof has been found satisfactory by the General Land Office and no conflicts or other objections are apparent, the register and receiver will allow claimant 60 days within which to make final payment for the land, and upon receipt of the same the register will issue final certificate, which will be transmitted to the General Land Office with the returns for the current month.

33. No fees or commissions are required of persons making entry under the desert-land laws except such fees as are paid to the officers for taking the affidavits and proofs. Unless the entry be perfected under the act of March 4, 1915 (see pars. 42 and 48 of this circular), the only payments made to the Government are the original payment of 25 cents an acre at the time of making the application and the final payment of \$1 an acre, to be paid at the time of making final proof. Where final proofs are made before the register or receiver in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana, they will be entitled to receive jointly 22½ cents for each 100 words of testimony reduced to writing; in all other States they will be allowed 15 cents per 100 words for such service. The United States commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive \$1 for administering the oath to each entryman and each final-proof witness where final-proof testimony has been reduced to writing by them.

RELIEF UNDER ACT OF MARCH 4, 1915 (38 STAT., 1138-1161).

34. The last three paragraphs of section 5 of the act of Congress approved March 4, 1915 (38 Stat., 1138-1161), entitled "An act making appropriations to supply deficiencies in appropriations for the fiscal year 1915 and for prior years, and for other purposes," authorize the Secretary of the Interior, under rules and regulations to be prescribed by him, to grant relief to certain classes of desert-land claimants. This new law provides that upon certain conditions such an entryman, or his duly qualified assignee, may obtain an extension of time, not exceeding three years from date of its allowance, in which to submit final proof; or that upon certain other conditions he may either complete his entry in the manner required of a homestead claimant or purchase the land on specified terms. The following rules and regulations (approved Apr. 13, 1915, Circular 399, and here printed without substantial change) will be observed in the administration of said provisions of law.

APPLICATIONS FOR RELIEF.

35. All applications for the benefits of the new law should be filed prior to the expiration of the time within which the applicant would otherwise be required to make final proof on his desert-land entry in the land office for the district in which the entered land is situated, to be forwarded, with appropriate recommendations, to the Commissioner of the General Land Office for action. They must be supported by the affidavit of the applicant, corroborated by two witnesses, as to the material facts necessary to be shown. All such affidavits must be executed before an officer authorized to administer oaths in desert-land cases. (See par. 11.)

All such applications should contain the name of the entryman and the date of the entry, and, if the entry has been assigned, the name of the assignee and date of the assignment; the description of the land involved; a statement of the various sums of money expended by the applicant or his grantors in an endeavor to reclaim the land, and the particular purpose for which each sum was expended; the facts by reason of which it has been impossible for claimant to effect reclamation and cultivation and to submit final proof within the usual period, or such extensions thereof as may have been granted; and the facts by reason of which the applicant considers that there is or is not, as the case may be, a reasonable prospect that, if an extension of time is granted him, he will be able to secure a sufficient water supply and make final proof of reclamation, irrigation, and cultivation, as required by the desert-land law.

CONDITIONS FOR EXTENSION OF TIME.

36. To entitle an entryman to the benefits of the first of the three paragraphs referred to, the following conditions must exist: (1) The entry must be a lawful, pending entry made prior to July 1, 1914; (2) the entryman must have complied with the requirements of the desert-land law with reference to yearly expenditures and the submission of annual proofs thereof; (3) there must be a reasonable prospect that, if an extension of time is granted, the claimant will be able to make the final proof of reclamation, irrigation, and cultivation, as required by law; (4) the case must be one in which an extension of time, or a further extension, can not properly be allowed under other laws; and (5) there must be established some fact or facts constituting a reasonable excuse for the applicant's failure to comply with the law within the usual time, and fairly entitling him, in justice and equity, to this form of relief.

The existence of the first two of these conditions can be determined by examination of the records of the General Land Office, but in order that applicants may have the benefit of every possible circumstance entitling them to equitable consideration, they are privileged to make such further showing as they may desire as to any moneys which they may have expended in improving the land, but not used as the basis of annual proof.

The existence of the third, fourth, and fifth conditions above enumerated must be established in all cases by the affidavits filed in support of the application for relief.

With regard to the third condition, it must be shown what steps the applicant has taken to secure a water right; and either that

he has secured such a right (so far as that is possible, under the State laws, in cases where beneficial application of the water to the land has not yet been made), or that there is no reason to doubt that he will be able to secure such a right before his final proof is due; that the source of water supply, if a natural stream, will, in ordinary seasons, furnish the amount of water needed by the claimant to reclaim the irrigable land in his entry after all appropriations prior to his have been satisfied; and, if water is to be taken from wells, that there is reason to believe that an adequate supply can be obtained from that source.

If water is to be obtained through an irrigation company, association, or district upon which a special agent or other officer has made a favorable report, and favorable action on such report has been taken, the existence of the third condition will be taken for granted, provided the applicant shows that he has become the owner of the required amount of stock or interest in the project, or taken the required steps to secure the inclusion of the land in the district, or that it will be entirely possible for him to do the one or the other, as the case may be.

If an adverse report has been made on the irrigation project in question, or if adverse action thereon has been taken, the applicant may present such showing of facts as may tend to refute the findings made and the conclusions reached, whereupon, if the allegations seem to warrant such action, a hearing will be ordered to determine the merits of the case.

The fourth condition above enumerated will be satisfied if the case does not come within the terms of any general or special acts of Congress providing for the allowance of extensions of time for submitting final proof on desert-land entries. The general acts are the following: June 27, 1906 (34 Stat., 519, sec. 5); March 28, 1908 (35 Stat., 52, sec. 3); and April 30, 1912 (37 Stat., 106). The only special acts now requiring mention in this connection are those of October 30, 1913 (38 Stat., 234), and April 11, 1916 (Public No. 49). Generally speaking, extensions of time can not be allowed under these acts where extensions aggregating six years under all acts, both general and special, have been granted; where the irrigation works intended to convey water to the land have been completed, or, for any other reason, the claimant's inability to submit final proof can not be attributed to unavoidable delay in the construction of such irrigation works; where the cause of delay in submitting the final proof is the claimant's temporary inability to acquire a water right; or where, on account of drought of greater or less duration, but not likely, in all probability, to be a permanent condition, the operation of a completed system of irrigation works has been hindered or delayed. Under any of these conditions an application for an extension of time under the first paragraph of the new law can be entertained, except where the entered lands have been included within the exterior limits of a land withdrawal or irrigation project under the act of June 17, 1902 (32 Stat., 388), and the submission of satisfactory final proof is being hindered or delayed thereby, so that the case comes within the provisions of the fifth section of the act of June 27, 1906, *supra*.

No application for extension of time can be allowed, however, if it appears that the claimant's inability to submit final proof as re-

quired by the desert-land law is due to his own neglect or default; nor will any such application be granted where it appears that there is no reasonable prospect that the applicant will be able to provide a supply of water sufficient to irrigate and permanently reclaim all the irrigable land embraced in his entry, because, in such a case, no extension of time can enable the entryman to comply with the requirements of the desert-land law.

OTHER FORMS OF RELIEF.

37. The second and third paragraphs of the new law are designed to afford relief in cases of the kind last above mentioned by authorizing the Secretary of the Interior, in his discretion, to permit the applicant to perfect his entry in the manner required of a homestead entryman, or to purchase the land on the terms specified, as the applicant may elect. The entry itself is not transmuted, however, but remains a desert-land entry, subject to a new kind of proof.

CONDITIONS AUTHORIZING HOMESTEAD PROOF AND PURCHASE.

38. To entitle a claimant to relief under either of these paragraphs, it must be made to appear to the satisfaction of the Secretary of the Interior (1) that the entry in question is a lawful pending entry, made prior to July 1, 1914; (2) where application for relief is made on behalf of an assignee, that the entry was assigned to him prior to March 4, 1915; (3) that the applicant, or his assignors, have, in good faith, expended the sum of \$3 per acre in the attempt to effect reclamation of the entered land; and (4) that there is no reasonable prospect that if the extension of time authorized under the provisions of this act, or any other existing law, were granted the applicant would be able to secure water sufficient to effect reclamation of the land in his entry or any subdivision thereof. The first two of these conditions can be determined from the records of the General Land Office.

With regard to the third condition, any expenditure which the claimant can show that he has made in good faith and with a reasonable belief that it would tend to effect reclamation of the land will be acceptable, even though such expenditure may not have been such as would satisfy the requirements for annual proof.

With regard to the fourth condition, the applicant should show what steps he has taken for the purpose of acquiring a water right and with what result, what has been done by himself or others toward the development of a water supply and the construction of an irrigation system to bring the water to the land, the reasons for his failure to secure an adequate water supply, and his grounds for believing that there is no reasonable prospect of final success in acquiring such a supply. In this connection consideration will be given to any special agent's reports on file regarding any irrigation company or irrigation district from which applicant has been endeavoring to secure water, and if it appears therefrom that there is no reasonable prospect that the applicant can secure a sufficient water supply, the existence of that condition will be taken for granted.

NOTICE OF ALLOWANCE OF RELIEF—ELECTION TO PURCHASE.

39. When any application for relief under the second paragraph shall have been allowed by the Commissioner of the General Land Office, notice thereof will be served through the proper local land office upon the claimant, advising him that he will be allowed five years from date of service of such notice within which to perfect his entry in the manner required of a homestead entryman, unless he shall, within 60 days from receipt of such notice, file in the local land office an election to perfect the entry within five years by purchase under the third paragraph, and pay to the receiver, at time of election, the sum of 50 cents for each acre embraced in the entry. Such election, if filed, must be in writing, signed by the claimant, and his signature thereto must be witnessed by two persons whose post office addresses shall be given. The election will be forwarded to the General Land Office with the regular monthly returns, and must bear the serial number of the entry to which it relates, and also the number of the receipt issued for the money paid in connection therewith.

PROCEDURE.

40. In the submission and consideration of final proofs under the second and third paragraphs, the usual course of procedure with regard to desert-land final proofs will be followed, so far as applicable. The notice of intention to submit proof, however, should indicate whether the entry is to be perfected as in homestead cases, or by purchase.

ASSIGNMENT AND ALIENATION.

41. As the benefits of the second and third paragraphs are not extended to assignees under assignments made after the date of the act, no assignment of a desert-land entry which, prior to the date of such assignment, has been authorized to be perfected under either of said sections, will be allowed; and in the final adjudication of entries being perfected under the provisions of said paragraphs, the same rules will be observed, as to proof of nonalienation, as in homestead cases.

ENTRIES PERFECTED BY COMPLIANCE WITH HOMESTEAD LAW.

42. A claimant who has received permission to perfect his entry in the manner required of homestead entrymen may make proof at any time when he can show that residence and cultivation have been maintained in good faith for the required length of time and to the required extent.

However, inasmuch as the homestead laws do not authorize the commutation of homesteads made under the enlarged homestead acts, commutation proof will not be accepted upon any desert-land entry involving more than 160 acres. In addition to the original payment of 25 cents per acre at time of entry, a claimant who makes commutation proof must pay for the land at the regular "minimum price" of \$1.25 per acre.

Failure to submit final proof within the five-year period allowed by the law will be ground for the cancellation of the entry, unless

good reason for the delay can be shown, in which event final certificate may be issued and the case referred to the board of equitable adjudication for confirmation.

Those provisions of the homestead law which define the personal qualifications required of entrymen do not apply to cases of this kind, but the final proof must show that the claimant possesses the same qualifications as to citizenship and the amount of land entered by him or assigned or patented to him, under the agricultural public-land laws, as in the case of those who make ordinary final proof on desert-land entries.

RESIDENCE ON ENTERED LAND.

43. If not already residing on his desert-land entry, the claimant must establish residence thereon within six months from the date of receiving the notice advising him that he will be permitted to perfect his entry under the second paragraph, unless such period be extended as permitted by the homestead law.

Residence upon the land must be continuously maintained for a period of three years from and after the date of its establishment. During each year the claimant may be absent for two periods only, the aggregate thereof not to exceed five months. Actual residence must be maintained for the remaining seven months of each year. If commutation proof is submitted, substantially continuous residence upon the land for a period of 14 months must be shown, together with the cultivation of not less than one-sixteenth of the area of the entry, unless a reduction of the area required to be cultivated be allowed. The requirements made by this circular as to the period of residence and amount of cultivation are those of the act of June 6, 1912 (37 Stat., 123), or the "three-year homestead law."

If a claimant establishes residence upon his entry prior to the allowance of his application for relief, and continues to maintain it in good faith as required by the homestead law, full credit will be allowed for the period during which such residence is so maintained.

Leaves of absence and credit for military service will be allowed upon the same terms and conditions as in case of a homestead entry.

The claimant must have a habitable house upon the land at the time of submitting final proof. Other improvements should be of such character and amount as are sufficient to show good faith.

CULTIVATION.

44. Cultivation of the land for at least two years is required, and this must generally consist of actual breaking of the soil, followed by planting, sowing of seed, and tillage for a crop other than native grasses. However, tilling of the land, or other appropriate treatment, for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year, will be deemed cultivation within the terms of the act (without sowing of seed), where that manner of cultivation is necessary or generally followed in the locality. During the second year not less than one-sixteenth of the area entered must be actually cultivated, and during the third year, and until final proof, cultivation of not less than one-eighth must be had. These requirements are applicable to all cases, without regard to the area

or location of the entry. The period of cultivation, like that of residence, may begin before the allowance of the application for relief; credit for all cultivation, if in accordance with the provisions of the three-year homestead law, will be allowed, without regard to the time when it was performed.

ENTRIES IN UTAH AND IDAHO.

45. If the entry is situated in the States of Utah or Idaho, and the lands involved have been, or shall be, designated as being of the character subject to entry under the sixth sections of the acts of February 19, 1909 (35 Stat., 639), as amended, or June 17, 1910 (36 Stat., 531), respectively, the entryman may avail himself of the privileges of these sections, upon a proper showing of the character of the land, as required of a homestead applicant thereunder, in which event residence need not be maintained upon the land, but the amount of cultivation required is double that in ordinary cases and must be shown during a period of four years. For further details, reference should be made to the circular of this office known as, "Suggestions to Homesteaders," copies of which may be obtained of this office or any local land office.

RIGHTS OF HEIRS AND DEVISEES.

46. If an entryman dies before being authorized to exercise the rights conferred by the second and third paragraphs, or after such authorization but before he has perfected his entry, his rights will pass to those persons who would inherit his lands according to the laws of the State wherein the entry is located or, if he leaves a will, to those to whom he devises such rights. Applications for the benefits of the new law may be filed, and proofs thereunder may be submitted either by one of the heirs in behalf of all, by a guardian of the heirs' estate if they themselves are minors, or by the entryman's executor or administrator, acting under the supervision of the proper probate court.

The heirs or devisees will not be required to settle or reside upon the land, but must show that the land has been cultivated and improved by them or on their behalf, as required by the homestead law, for such period as will, when added to the entryman's period of compliance with the law, aggregate the required term of three years. If they desire to commute the entry, they must show a 14 months' period of such residence and cultivation on the part of themselves or the entryman, or both, as would have been required of him had he survived.

With regard to the reduction of the required area of cultivation, the same rules and procedure will be followed as in homestead cases.

FEES AND COMMISSIONS.

47. The same fees, and no others, may be charged by registers and receivers upon submission of final proofs under the new law as upon submission of ordinary desert-land proofs. (See par. 33.) No commissions may be charged under any circumstances and no testimony fees unless the proof is taken at the land office.

ENTRIES PERFECTED BY PURCHASE.

48. If claimant elects to perfect his entry under the third paragraph he must, within five years from the date of his election and payment of the sum of 50 cents per acre, make final proof and pay to the receiver the further sum of 75 cents for each acre of land embraced in his entry. The final proof, in order to be acceptable, must show that, at the date of the proof, the claimant has upon the tract permanent improvements conducive to the agricultural development thereof, of the value of at least \$1.25 per acre, and that he has in good faith used the land for agricultural purposes for at least three years. Under this third paragraph grazing will be regarded as an agricultural use, provided it be established that the land is best suited to that purpose and has been so used in good faith. Actual residence on the land need not be shown.

IMPROVEMENTS REQUIRED.

49. Improvements made during the first three years of the life of the entry and used as the basis of annual proof, if permanent in character and conducive to the agricultural development of the land, may be counted as improvements required to be shown under this section, provided their character and continued existence are satisfactorily established by the final proof; but no water rights or irrigation ditches will be recognized for this purpose unless it is clearly shown that they have been made actually conducive to the agricultural development of the land, or a portion thereof, and that that fact is not inconsistent with the truth of the claimant's preliminary showing that there was no reasonable prospect that he could acquire a sufficient water supply to irrigate the irrigable land of his entry.

FORFEITURE.

50. If a claimant fails to make final proof and payment, as required by the third paragraph, within the five-year period, all sums theretofore paid by him will be forfeited and the entry canceled.

FORM OF PROOFS.

51. Final proofs under the second paragraph may be made on the forms used in homestead cases. For final proofs to be made under the third paragraph new forms will be furnished.

CONTESTS AND RELINQUISHMENTS.

52. Contests may be initiated by any person seeking to acquire title to or claiming an interest in the land involved, against a party to any desert-land entry, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim not shown by the records of the Land Department.

Successful contestants will be allowed a preference right of entry for 30 days after notice of the cancellation of the contested entry, in the same manner as in homestead cases, and the register will give the same notice and is entitled to the same fee for notice as in other cases.

53. A desert-land entry may be relinquished at any time by the party owning the same, and when relinquishments are filed in the local land office the entries will be canceled by the register and receiver in the same manner as in homestead, preemption, and other cases, under the first section of the act of May 14, 1880 (21 Stat., 140). Conditional relinquishments will not be accepted.

54. All previous rulings and instructions not in harmony herewith are hereby vacated.

CLAY TALLMAN, *Commissioner*.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

STATUTES.

An Act to Provide for the Sale of Desert Lands in Certain States and Territories.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section,¹ by conducting water upon the same, within the period of three years² thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years² after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: *Provided,* That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres,¹ which shall be in compact form.

SEC. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop,

¹ Limited to 320 acres by act of March 3, 1891 (26 Stat., 1095).

² Time extended to four years by act of March 3, 1891, *supra*.

shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

SEC. 3. That this act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Approved, March 3, 1877. (19 Stat., 377.)

Three Hundred and Twenty Acre Limitation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

Approved, August 30, 1890. (26 Stat., 391.)

An Act to Repeal Timber-Culture Laws, and for Other Purposes.

* * * * *

SEC. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred and seventy-seven, is hereby amended by adding thereto the following sections:

SEC. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections or fractional parts of sections of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights

for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act: *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States.

SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

* * * * *

Approved, March 3, 1891. (26 Stat., 1095.)

Section 2294, United States Revised Statutes, as Amended by Act of March 4, 1904 (33 Stat., 59).

SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal

jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

For each affidavit, twenty-five cents.

For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

For each deposition of claimant or witness, prepared by the officer, one dollar.

Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars.

An Act Limiting and Restricting the Right of Entry and Assignment Under the Desert-Land Law and Authorizing an Extension of Time Within Which to Make Final Proof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act the right to make entry of desert lands under the provisions of the act approved March third, eighteen hundred and seventy-seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," as amended by the act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," shall be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however*, That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public-land surveys, within

ninety days after the filing of the approved plat of survey in the district land office.

SEC. 2. That from and after the date of the passage of this act no assignment of an entry made under said acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

SEC. 3. That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof, as required by said acts, of the completion of said work.

Approved, March 28, 1908. (35 Stat., 52.)

An Act for the Protection of the Surface Rights of Entrymen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided*, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without

reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved, March 3, 1909. (35 Stat., 844.)

An Act to Provide for Agricultural Entries on Coal Lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the act approved June seventeenth, nineteen hundred and two, known as the reclamation act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An act to provide for an enlarged homestead." *Provided*, That those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

SEC. 2. That any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the reclamation act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this act.

SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this act, for the purpose of prospecting

for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Approved, June 22, 1910. (36 Stat., 583.)

An Act Authorizing the Secretary of the Interior to Grant Further Extension of Time Within Which to Make Proof on Desert-Land Entries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may, in his discretion, in addition to the extension authorized by existing law, grant to any entryman under the desert-land laws a further extension of the time within which he is required to make final proof: *Provided*, That such entryman shall, by his corroborated affidavit filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor; but such extension shall not be granted for a period of more than three years, and this act shall not affect contests initiated for a valid existing reason: *Provided*, That the total extension of the statutory period for making final proof that may be allowed in any one case under this act, and any other existing statutes of either general or local application, shall be limited to six years in the aggregate.

Approved, April 30, 1912. (37 Stat., 106.)

An Act to Provide for Agricultural Entry of Lands Withdrawn, Classified, or Reported as Containing Phosphate, Nitrate, Potash, Oil, Gas, or Asphaltic Minerals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic

minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation of the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres: *Provided*, That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this act.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character.

SEC. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the

United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

Approved, July 17, 1914. (38 Stat., 509.)

An Act Providing for Second Homestead and Desert-Land Entries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person otherwise duly qualified to make entry or entries of public lands under the homestead or desert-land laws, who has heretofore made or may hereafter make entry under said laws, and who, through no fault of his own, may have lost, forfeited, or abandoned the same, or who may hereafter lose, forfeit, or abandon same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry or entries had never been made: *Provided*, That such applicant shall show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right nor committed a fraud or attempted fraud in connection with such prior entry or entries.

Approved, September 5, 1914. (38 Stat., 712.)

An Act Making Appropriations to Supply Deficiencies in Appropriations for the Fiscal Year Nineteen Hundred and Fifteen and for Prior Years, and for Other Purposes.

* * * * *

That the Secretary of the Interior may, in his discretion, extend the time within which final proof is required to be submitted upon any lawful pending desert-land entry made prior to July first, nineteen hundred and fourteen, such extension not to exceed three years from the date of allowance thereof: *Provided*, That the entryman or his duly qualified assignee has, in good faith, complied with the requirements of law as to yearly expenditures and proof thereof, and shall show, under rules and regulations to be prescribed by the Secretary of the Interior, that there is a reasonable prospect that if the extension is granted he will be able to make the final proof of reclamation, irrigation, and cultivation required by law: *Provided further*, That the foregoing shall apply only to cases wherein an extension or further extension of time may not properly be allowed under existing law.

That where it shall be made to appear to the satisfaction of the Secretary of the Interior, under rules and regulations to be prescribed by him, with reference to any lawful pending desert-land

entry made prior to July first, nineteen hundred and fourteen, under which the entryman or his duly qualified assignee under an assignment made prior to the date of this act has, in good faith, expended the sum of \$3 per acre in the attempt to effect reclamation of the land, that there is no reasonable prospect that, if the extension allowed by this act or any existing law were granted, he would be able to secure water sufficient to effect reclamation of the irrigable land in his entry or any legal subdivision thereof, the Secretary of the Interior may, in his discretion, allow such entryman or assignee five years from notice within which to perfect the entry in the manner required of a homestead entryman.

That any desert-land entryman or his assignee entitled to the benefit of the last preceding paragraph may, if he shall so elect within sixty days from the notice therein provided, pay to the receiver of the local land office the sum of 50 cents per acre for each acre embraced in the entry, and thereafter perfect such entry upon proof that he has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than \$1.25 per acre, and that he has in good faith used the land for agricultural purposes for three years, and the payment to the receiver at the time of final proof of the sum of 75 cents per acre: *Provided*, That in such case final proof may be submitted at any time within five years from the date of the entryman's election to proceed as provided in this section, and in the event of failure to perfect the entry as herein provided all moneys theretofore paid shall be forfeited and the entry canceled.

Approved, March 4, 1915. (38 Stat., 1138-1161.)

LAWS AND REGULATIONS RELATING TO THE RECLAMATION OF ARID LANDS BY THE UNITED STATES.

CIRCULAR.

APPROVED MAY 18, 1916.

REGULATIONS.

This circular contains only the laws specifically applying to reclamation homestead entries and water-right applications and regulations thereunder, but does not contain the general homestead laws, most of which also apply to reclamation homestead entries.

GENERAL INFORMATION.

1. Section 3 of the act of June 17, 1902 (32 Stat., 388), provides for the withdrawal of lands from all disposition other than that provided for by said act. Lands withdrawn as susceptible of irrigation (usually referred to as withdrawn under the second form) are subject to entry under the provisions of the homestead law only, and since the passage of the act of June 25, 1910 (36 Stat., 835), are open to settlement or entry only when approved farm-unit plats have been filed and water is ready to be delivered to the land in said farm units or some part thereof and such fact has been announced by the Secretary of the Interior, except as provided by the act of February 18, 1911 (36 Stat., 917), as amended by section 10 of the act of August 13, 1914 (38 Stat., 686). Where settlements had been effected in good faith prior to June 25, 1910, on lands embraced within second-form withdrawals, persons showing such settlement are entitled to complete entry in the manner and within the time provided by law. The reclamation act of June 17, 1902, and acts amendatory thereof or supplementary thereto are hereinafter referred to generally as the reclamation law.

2. Under the provisions of the act of February 18, 1911 (36 Stat., 917), as amended by section 10 of the act of August 13, 1914 (38 Stat., 686), the prohibition contained in section 5 of the act of Congress approved June 25, 1910, forbidding settlement on or entry of lands reserved for irrigation purposes prior to the approval of farm-unit plats and the announcement of the fact that water is ready to be delivered to the land, is set aside as to lands included in entries made prior to June 25, 1910, where such entries have been or may be relinquished in whole or in part.

3. Settlement and entry of such lands will be allowed subject to the provisions of the homestead law and the reclamation law in the same manner as for other lands subject to entry within reclamation projects except that the certificate of the project manager that water-right application has been made and charges deposited, which must be filed in the ordinary case, is not required. (See par. 5.) The

lands must have been covered by a valid entry prior to June 25, 1910, and shall only be subject to entry under the provisions of the present act in cases where a relinquishment of the former entry has been or shall be filed. Registers and receivers in their action on applications to make homestead entry under the provisions of this act will be governed by the records of their office and will note on all entries allowed hereunder the homestead number and date of the relinquished entry and the fact that the new entry is allowed subject to the provisions of section 10 of the act of August 13, 1914 (38 Stat., 686).

4. Entries are permitted under the act of February 18, 1911, as amended by section 10 of the act of August 13, 1914, upon the relinquishment of an entry made prior to June 25, 1910, and the right to enter such land is not limited to one or more entries or entrymen. (Lena Hektner, 42 L. D., 462.) This act has no application where the cancellation of the entry made prior to June 25, 1910, was the result of a contest or of a relinquishment resulting from the same. (Fred V. Hook, 41 L. D., 67.) The act is also inapplicable in the case of lands withdrawn under the first form and has reference only to lands covered by second-form withdrawals. (Annie G. Parker, 40 L. D., 406.)

5. Homestead entries of lands platted to farm units and covered by public notice are made practically in the same manner as the ordinary homestead entry, and registers and receivers will allow homestead applications for such lands, if found regular, and accompanied by a certificate of the project manager showing that water-right application has been filed and the proper water-right charges deposited. No application to make homestead entry of lands within a reclamation project and covered by public notice will be received unless accompanied by such certificate of the project manager. Where under the reclamation law lands within the reclamation project are subject to entry notwithstanding public notice covering said lands has not yet issued, such certificate of the project manager is not required, and in such cases the application, if otherwise regular, will be received and entry allowed. The register and receiver will immediately notify the project manager of each entry allowed, stating whether the entry was allowed with or without the certificate of the project manager above referred to.

6. Registers and receivers will indorse across the face of each homestead application, when allowed under the reclamation act, the following: "This entry allowed subject to the provisions of the act of June 17, 1902 (32 Stat., 388)," and will advise each entryman of the provisions of the act by furnishing him with a copy of this circular.

7. These entries are not subject to the commutation provisions of the homestead law, and on the determination by the Secretary of the Interior that the proposed irrigation project is practicable, the entries hitherto made and not conforming to an established farm unit may be reduced in area to the limit representing the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question, and the lands within a project are platted to farm units representing such areas.

SUBDIVISION OF FARM UNITS.

8. An entry may be made of part of an established farm unit, (a) when the remaining portion of said unit is also desired for entry simultaneously by another person and is, in the judgment of the project manager, sufficient, if carefully managed, to return to the reclamation fund the charges apportioned to the irrigable area thereof, or (b) can be advantageously included as part of an established farm unit, or (c) can in combination with existing farm units be advantageously replatted into new farm units, each sufficient, if carefully managed, to support a family and return to the reclamation fund the charges apportioned to the irrigable area of the several new farm units.

9. Where it is desired to make entry of part only of a farm unit, an application for the amendment and subdivision of such unit should be filed with the project manager. If such subdivision is rectangular and survey is not required to determine the division of the irrigable area of the farm unit as proposed to be divided, no charge will be made. If a survey shall be found necessary to determine the boundaries of the subdivision of any such farm unit or the division of the irrigable area, the project manager will proceed as directed in paragraph 38 of this circular. Upon such application being filed, the project manager will either approve or disapprove the same, and if approved, proceed as directed in paragraph 39 of this circular.

10. The farm units may be as small as 10 acres where the lands are suitable for fruit raising, etc., but on most projects so far they have been fixed at from 40 to 80 acres each. These areas are announced on farm-unit plats, and public notice stating the amount of the charges and other details concerning payment is issued by the Secretary of the Interior. Until this public notice is issued it will be impossible in most respects to give definite information as to any particular tract or as to the details intended to be covered by such notice; but registers and receivers will, upon inquiry, give all general information relative to the public lands included in reclamation projects and will keep the project managers of the Reclamation Service fully informed by correspondence as to conditions affecting the same.

WITHDRAWALS AND RESTORATIONS.

11. The withdrawal of these lands at first is principally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated, even if the project is feasible, but it will be impossible to decide in advance of careful examination what lands may be watered, if any, and the mere fact that surveys are in progress is no indication whatever that the works will be built. It can not be determined how much water there may be available or what lands can be covered or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed.

12. There are two classes of withdrawals authorized by the act—one commonly known as "withdrawals under the first form," which

embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other, commonly known as "withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works.

13. After lands have been withdrawn under the first form they can not be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal. (See John J. Maney, 35 L. D., 250.) Any withdrawal otherwise valid shall not be affected by failure to note same on tract book or otherwise follow usual procedure. (42 L. D., 318.) Lands can not be examined at the instance of individuals prior to the completion of construction to determine whether particular lands will be irrigable. (42 L. D., 8.)

14. In the event any lands embraced in any unapproved or uncertified selection are needed in the construction and maintenance of any irrigation works (other than for right of way for ditches or canals reserved under act of Aug. 30, 1890, 26 Stat., 391) under the reclamation law, the Government may cancel such selection and appropriate the lands embraced therein to such use.

15. Where there are any improvements erected on such lands in good faith, payment therefor will be made upon agreement of the owner with the representative of the Government as to the value of the improvements. Where the owner of the improvements and the representative of the Government fail to agree as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings under judicial process, as provided by section 7 of the reclamation act.

16. Lands withdrawn under the second form and becoming subject to entry in the manner provided by section 10 of the act of August 13, 1914, can be entered only under the homestead laws and subject to the provisions, limitations, charges, terms, and conditions of the reclamation law, and all applications to make selections, locations, or entries of any other kind on such lands should be rejected, regardless of whether they are presented before or after the lands are withdrawn, except that where settlement rights were acquired prior to the withdrawal and have been diligently prosecuted and the homestead law complied with, the settler will be entitled to make and complete his entry subject to all the charges, terms, conditions, limitations, and provisions of the reclamation law. (See Sarah E. Allen, 44 L. D., 331.) No person will be permitted to gain or exercise any right whatever under any settlement or occupation begun after withdrawal of the land from settlement and entry until the land becomes subject to settlement and entry under the provisions of the acts of June 25, 1910, February 18, 1911, and section 10 of the act of August 13, 1914, or is restored to the public domain.

17. Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all

entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made. All lands, however, taken up under any of the land laws of the United States subsequent to October 2, 1888, are subject to right of way for ditches or canals constructed by authority of the United States (act of Aug. 30, 1890, 26 Stat., 391; circular approved by department July 25, 1903). All entries made upon the lands referred to are subject to the following proviso of the act cited:

That in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

18. Should a homestead entry embrace land that is needed in whole or in part for purposes contemplated by said proviso in the act of August 30, 1890, the land would be taken for such purpose, and the entryman would have no claim against the United States for the same.

19. All withdrawals become effective on the date upon which they are ordered by the Secretary of the Interior, and all orders for restorations on the date they are received in the local land office unless otherwise specified in the order. (George B. Pratt et al., 38 L. D., 146.)

20. Upon the cancellation of an entry covering lands embraced within a withdrawal under the reclamation act such withdrawal becomes effective as to such lands without further order. (See Cornelius J. MacNamara, 33 L. D., 520.) Such lands under first-form withdrawal can not, therefore, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person.

21. Where the Secretary of the Interior by the approval of farm-unit plats has determined, or may determine, that the lands designated thereon are irrigable, the filing of such plats in the General Land Office and in the local land offices is to be regarded as equivalent to an order withdrawing such lands under the second form, and as an order changing to the second form any withdrawals of the first form then effective as to any such tracts. This applies to all areas shown on the farm-unit plats as subject to entry under the provisions of the reclamation law or as subject to the filing of water-right applications, and to all farm units to which the Secretary has announced that water is ready to be delivered. Upon receipt of such plats appropriate notations of the change of form of withdrawal are to be made in accordance therewith upon the records of the General Land Office and of the local land offices.

22. Inasmuch as every entry made under the reclamation law is subject to conformation to an established farm unit, improvements placed upon the different subdivisions by the entryman prior to such conformation are at his risk. (Jerome M. Higman, 37 L. D., 718.) They should be confined to one legal subdivision until the entry is conformed. In readjusting such an entry the Secretary is not required to confine the farm unit to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract lying

outside of the entry, so as to equalize in value the several farm units. (Idem.) The act of June 27, 1906, authorizes the Secretary of the Interior to fix a lesser area than 40 acres as a farm unit when, "by reason of market conditions and special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than 40 acres may be sufficient for the support of a family" or when necessary "in order to provide for practical and economical irrigation."

ADDITIONAL ENTRIES.

23. A person who has made homestead entry for any area within a reclamation project can not make an additional homestead entry for lands outside of a project, nor for lands within a project except as provided in the following paragraph. One who has made homestead entry for less than 160 acres outside of a reclamation project is disqualified from making an additional entry within a reclamation project, as every entry within a project is either made for or is subject to conformation to a farm unit, which is the equivalent of a homestead entry of 160 acres of land outside of a reclamation project. (38 L. D., 58.)

24. Where, however, the first or original homestead entry was made subject to the restrictions and conditions of the reclamation act, any entry additional thereto would be likewise subject to the same restrictions and conditions, and in such cases additional entries may be allowed within reclamation projects under acts authorizing additional entries, except where farm units have been established prior to the filing of the applications. Both entries so allowed are subject to the same adjustment to one farm unit as if the entire tract had been included in the first entry. (Henry W. Williamson, 38 L. D., 233.)

ENTRIES UNDER ACT OF MARCH 4, 1915.

25. Applications to make new entry under the provisions of this act must be on the form provided for homestead applications, must refer to the serial number and give the description of the former entry, and must be accompanied by a relinquishment of the former entry and an affidavit by the applicant showing the facts upon which he claims to be entitled to the provisions of this act. The showing filed by the applicant must be immediately transmitted to the project manager of the Reclamation Service for his report and recommendation thereon, and upon the receipt thereof the register and receiver will transmit all the papers to the General Land Office with their recommendation thereon. The project manager will forward two copies of his report to the Chief of Construction. The register and receiver will indorse on the face of each such application the fact that it is under the provisions of the act of March 4, 1915. (38 Stat., 1215.)

26. Such applications will be given current numbers of the land-office series, and the proper fee and commissions will be collected in each case.

27. This act permits a new entry only where the former entry was made subject to the provisions of the act of June 17, 1902 (32 Stat., 388), for land which was believed to be susceptible of irrigation,

where it has since been determined that the land embraced in such entry or all thereof in excess of 20 acres is not or will not be irrigable under the project. This act permits the new entry to be made only within the same project as the former entry, nor may any land be entered under this act until such land has been designated as a farm unit. Any such farm unit entered under this act will be subject to conformation to a new farm unit, in the discretion of the department, and will be subject to all the charges, terms, conditions, and limitations of the act of June 17, 1902 (32 Stat., 388), and acts supplemental thereto and amendatory thereof.

28. In order that there may be uniformity in the administration of the act of March 4, 1915, no applications thereunder will be allowed by local officers on their own initiative, but all will be forwarded to the General Land Office for consideration.

CONTESTS.

29. An entry embracing lands included within a first or second form reclamation withdrawal, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, except that for failure to pay the construction charges or charges for operation and maintenance no contest will lie, and any contestant who secures the cancellation of such entry and pays the land-office fees occasioned by his contest will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first-form withdrawal at time of successful termination of the contest the preferred right may prove futile, for it can not be exercised as long as the land remains so withdrawn, but should the lands involved be restored to the public domain or a farm-unit plat be approved for the lands and announcement made that water is ready to be delivered, the preference right may be exercised at any time within 30 days from notice of the restoration or the establishment of farm units. Should the land be within a second-form withdrawal, the successful contestant can not be allowed to exercise his preference right of entry prior to the time when the Secretary shall have established the unit of acreage and announced the fact that water is ready to be delivered to the land in said farm unit or some part thereof, but when the farm unit is established and water available as stated, he may make entry under the terms of the reclamation law. If, however, the land at any time be released from all forms of withdrawal, he may enter as in other cases made and provided. It should be the duty, however, of such contestant to keep the local officers advised respecting his residence to which notice may be sent him of his preference right of entry in event of successful contest, when the land is subject to entry, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the act of May 14, 1880 (21 Stat., 140). No contest can be allowed, however, against any qualified entryman who prior to June 25, 1910, made bona fide entry upon lands proposed to be irrigated and who established residence in good faith upon the lands entered by him for failure to maintain residence or to make

improvements upon his land prior to the time when water is available for its irrigation.

30. Under these regulations the filing of contests will be allowed against homestead entries made subject to the reclamation law in the following cases:

(a) Where the entry was made on or after June 25, 1910.

(b) Where the entry was made prior to June 25, 1910, and it is alleged that the entryman failed to establish residence in good faith upon the lands entered by him.

(c) Where the entry was made prior to June 25, 1910, and a period of 90 days has elapsed since the issuance of public notice under section 4 of the reclamation act of June 17, 1902 (32 Stat., 388), fixing the date when water will be available for irrigation of the land.

(d) Where the entry was made prior to June 25, 1910, for any causes other than "failure to maintain residence or make improvements upon the land prior to the time when water is available."

LEAVE OF ABSENCE.

31. When homestead entrymen within irrigation projects file in the local land office applications for leave of absence under the provisions of the act of June 25, 1910, the register and receiver will make proper notation of the same on their records and at once, by special letter, forward the application, together with their recommendation thereon, to the General Land Office for action.

32. These applications for leave of absence should be in the form of an affidavit duly corroborated by two witnesses, contain a specific description of the land, show the good faith of the applicant, and set forth in detail the character, the extent, and the approximate value of the improvements placed on the lands, which must be such as to satisfy the requirement of the law that the entryman has made substantial improvements, and the applicant must show, as a matter of fact, that water is not available for the irrigation thereof. The statement regarding the availability of water for irrigation must be corroborated by certificate of the project manager, to be filed with the application for leave.

33. When sufficient showing is made in cases coming within the provisions of the law, leave of absence will be granted until such time as water for irrigation is turned into the main irrigation canals from which the land is to be irrigated or, in the event that the project is abandoned by the Government, until the date of notice of such abandonment and the restoration to the public domain of the lands embraced in the entry.

34. Attention is directed to the provision that "the period of actual absence shall not be deducted from the full time of residence required by law." The effect of the granting of leave of absence under this act is to protect the entry from contest for abandonment, and by the necessary implication of the act the period within which the entryman is required to submit final proof will be extended and the entry will not be subject to cancellation for failure to submit proof until the expiration of the period allowed in which to submit final proof, exclusive of the period for which leave of absence may be granted. Under the provisions of the act of April 30, 1912 (37 Stat., 105), no qualified entryman for lands within a reclamation

project whose entry was made prior to June 25, 1910, and who established residence in good faith upon the lands so entered shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time public notice is issued fixing the water-right charges and announcing that water is available for the irrigation of the land embraced in his entry. Within 90 days after the issuance of public notice under section 4 of the act of June 17, 1902 (32 Stat., 388), fixing the water-right charges and announcing the date when water will be available for irrigation, the entryman must file water-right application for the irrigable land in his entry in conformity with the public notice and farm-unit plat, and must file in the local land office an affidavit showing that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make final proof.

ASSIGNMENTS.

35. Under the provisions of the act of June 23, 1910 (36 Stat., 592), persons who have made or may make homestead entries subject to the reclamation law may assign their entries in their entirety at any time after filing in the local land office satisfactory proof of the residence, improvements, and cultivation required by the ordinary provisions of the homestead law. The act also provides for the assignment of homestead entries in part, but such assignments, if made after farm units are established, must conform thereto, except as hereinafter provided. (See pars. 36 to 39.)

36. In cases where the entry involves two or more farm units, the entryman may file an election as to which farm unit he will retain, and he may assign and transfer to a qualified assignee any farm unit or farm units entirely embraced within the original entry. He may also assign parts of farm units included in his entry, provided the assignee has an entry covering or obtains an assignment of the remainder of such unit. If an election by the entryman to conform to a farm unit be filed and no assignment made of the remainder of the entry, the entry will be conformed to the farm unit selected for retention and canceled as to the remainder.

37. Where it is desired to assign a part of an established farm unit, an application for the amendment and subdivision of such unit should be filed with the project manager. The assignment, with accompanying affidavits of the assignee and assignor, must also be filed with the project manager for his consideration.

38. If a survey shall be found necessary to determine the boundaries of the subdivision of any such farm unit, or the division of the irrigable area, a deposit equal to the estimated cost of such survey must be made with the special fiscal agent, Reclamation Service, on the project by or on behalf of the parties concerned. Any excess over the actual cost will be returned to the depositor or depositors after completion of the survey, and they will also be required to make good any deficiency in their deposit.

39. When the plats describing the amended farm units are approved by the project manager, he will forward copy of the amendatory plat, in duplicate, together with the assignment and accompanying affidavits, to the local land office, where one copy of the

amendatory plat will be retained, and one copy will be forwarded by the local land officers to the General Land Office, together with the assignment and accompanying affidavits. A copy of the amendatory plat should also be at once forwarded by the project manager to the director's office at Washington, D. C., to be formally approved in the usual manner by authority of the Secretary.

40. No assignment of a homestead entry or any part thereof shall be accepted by the Commissioner of the General Land Office, or recognized as valid for any purpose, until after the filing in the local land office of the instruments required by paragraph 41.

41. Assignments under this act are expressly made "subject to the limitations, charges, terms, and conditions of the reclamation act," and inasmuch as the law limits the right of entry to one farm unit and forbids the holding of more than one farm unit prior to payment of all construction or building and betterment charges each assignor must present a showing in the form of an affidavit to the effect that the assignment is an absolute sale, divesting him of all interest in the premises assigned, and each assignee must present a showing in the form of an affidavit that he does not own or hold and is not claiming any other farm unit or entry under the reclamation law upon which all installments of construction or building and betterment charges have not been paid in full and has no existing water-right applications covering an area of land which, added to that taken by assignment, will exceed 160 acres, or the maximum limit of area fixed by the Secretary of the Interior. If the assignee is a woman, it must be shown whether she is married or single, and if a married woman it must be shown that the assignment is purchased with her own separate money, in which her husband has no interest or claim (39 L. D., 504, and Sadie A. Hawley, 43 L. D., 364). These affidavits must be accompanied by evidence of the conveyance of the land, as indicated in paragraph 42, and a further showing in the form of a certificate of the project manager that water-right application therefor is not yet receivable, or that the assignee has filed in the project office for acceptance a water-right application in due form for the land embraced in the assignment. The affidavits and certificates above described should be in the following form, inserting the proper names, descriptions, etc., in the places indicated:

CERTIFICATES OF PROJECT MANAGER.

This is to certify that the project manager of the _____ project, State of _____, has not been authorized to receive water-right application for the following-described lands under said project, or any part thereof, to wit: _____

Dated _____, 19____.

Project Manager, _____ Project.
_____ State.

Or—

This is to certify that _____, post-office address _____, did on the _____ day of _____, 19____, file in the office of the project manager, for acceptance, a water-right application in due form for the irrigable area in the following-described tract of land under said project, to wit: _____

Dated _____, 19____.

Project Manager, _____ Project.
_____ State.

AFFIDAVIT OF ASSIGNOR.

_____, of _____, being duly sworn, deposes and says that h_____ assignment under the act of June 23, 1910 (36 Stat., 592), of farm unit _____, or the _____ of section _____, township _____, range _____, _____ meridian, is a bona fide and absolute sale of all h_____ interest in and to the land and rights therein described, and that the assignee takes and holds same, as far as affiant is concerned, absolutely and free from any claim, interest, or demand on the part of the affiant other than _____

(If mortgaged, so state.)

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL.] _____

(Official character.)

AFFIDAVIT OF ASSIGNEE.

_____, of _____, being duly sworn, deposes and says that _____ he is the assignee of _____ under the act of June 23, 1910 (36 stat., 592), for farm unit _____, or the _____ section _____, township _____, range _____, _____ meridian; that _____ he is a duly qualified assignee for the reason that _____ he is over 21 years of age, that _____ he does not own or hold, and is not claiming any other farm unit or entry under the reclamation act of June 17, 1902 (32 Stat., 388), or acts amendatory thereof or supplemental thereto, upon which payment in full of all installments of construction or building and betterment charges has not been made, and that the water right for the lands above described, together with all water rights or lands held by h_____ under the reclamation law, do not exceed 160 acres of irrigable land; that this assignment is accepted subject to any unsatisfied mortgage against the land or any part thereof duly filed and recorded in the local land office; that she is _____ married;¹ that this assignment is purchased with her own separate money in which her husband has no interest or claim;² and that _____ he has no agreement or understanding whereby any interest therein will inure to the benefit of another. Affiant further says that _____ he has acquired the entire interest of the assignor in the tract assigned and does not hold same as trustee or in any other manner for or on behalf of the assignor.

Subscribed and sworn to before me this the _____ day of _____, 191____.

[SEAL.] _____

(Official character.)

42. Assignments may be effected by quitclaim or warranty deed or by any other form of conveyance in general use in the State in which the land is located, but a quitclaim or warranty deed is preferred. The original instrument of assignment, or where the instrument is recorded, a copy thereof certified by the officer who has custody of the record will be accepted. Where the original instrument of assignment is presented to an officer having an official impression seal, a copy of the instrument certified by such officer under his seal will be accepted if accompanied by satisfactory evidence

¹ To be filled in by all female assignees.

² Strike out where assignee is not a married woman.

of compliance with the documentary stamp tax provisions of the internal revenue law.

43. Assignments made and filed in accordance with these regulations must be noted on the local land office records and at once forwarded to the General Land Office for immediate consideration. Where an assignment which does not fully comply with the above regulations is presented to the local land office the register and receiver will reject same, subject to the right of appeal to the Commissioner of the General Land Office in accordance with the rules of practice. Upon the approval of an assignment, the assignee will at the proper time make payment of the water-right charges and submit proof of reclamation as would the original entryman, and, after proof of full compliance with the law, may receive a patent for the land.

MORTGAGES.

44. Mortgagees of land embraced in homestead or desert-land entries within reclamation projects may file in the local land office for the district in which the land is located a notice of such mortgage interest, and shall thereupon become entitled to receive and be given the same notice of any contest or other proceedings thereafter had affecting the entry as is required to be given the entryman in connection with such proceedings, and a like notice of mortgage interest may be filed with the project manager in case of any lands, whether or not water-right application has been filed under the provisions of the act of June 17, 1902 (32 Stat., 388), including homestead entries, desert-land entries, and lands in private ownership; and thereupon the mortgagee shall receive copies of all notices of default in payment of the water-right charges levied by the Secretary of the Interior against such lands, and shall be permitted to make payment of the amount so in default within 60 days from the date of such notice. Any payment so made shall be credited on the charges levied by the Secretary of the Interior against such lands.

45. Every such notice of mortgage interest filed as provided in the preceding paragraph must be forthwith noted upon the records of the project manager and of the local land office, and be promptly reported to the Director of the Reclamation Service and to the Commissioner of the General Land Office, where like notations will be made. Relinquishment of a homestead or desert-land entry or part thereof, within a reclamation project, upon which final proof has been submitted, where the records show the land to have been mortgaged, will not be accepted or noted unless the mortgagee joins therein; nor will an assignment of such a homestead entry or part thereof under the act of June 23, 1910 (36 Stat., 592), nor an assignment of a mortgaged desert-land entry where the records show the land to have been mortgaged, be recognized or permitted unless the assignment specifically refers to such mortgage and is made and accepted subject thereto.

46. If such mortgagee buy in the land at foreclosure sale, such mortgagee-purchaser, whether a nonresident or corporation, may, at any time within one year after the end of the statutory period of redemption, if there be such statutory period, and if not, at any time within one year after such foreclosure sale, make proof of cul-

tivation and reclamation of the land under section 1 of the act of August 9, 1912 (37 Stat., 265), and receive final water-right certificate, provided such mortgagee-purchaser is otherwise qualified so to do. Water will be furnished said land, and no steps will be taken to cancel the water-right application on account of the holdings by the same mortgagee-purchaser of lands in excess of 160 acres, or the limit per single ownership of private land as fixed by the Secretary of the Interior for which a water right may be purchased, until two years after such foreclosure purchase, provided that all charges in connection with the water-right application that may be due at the time of the foreclosure sale and all such charges that may become due during the period when the land is held under the terms hereof shall be promptly paid by or on behalf of such mortgagee-purchaser. To secure the benefits hereof, the mortgagee purchasing the land at foreclosure sale, must give notice thereof to the register of the local land office and to the officer in charge of the project within 60 days after such purchase.

CANCELLATION.

47. All homestead and desert-land entrymen holding land under the reclamation law must, in addition to paying the water-right charges, reclaim the land as required by the reclamation law. Homestead entrymen must reside upon, cultivate, and improve the lands embraced in their entries for not less than the period required by the homestead laws. Desert-land entrymen must comply with the provisions of the desert-land laws as amended by the reclamation law. Failure to make any two payments when due, or to reclaim the land as required by law, will render the entry subject to cancellation and the money paid subject to forfeiture, whether water-right application has been made or not. Upon receipt of a statement from the Director of the Reclamation Service that two of such payments remain due and unpaid, after proper service upon the entryman and upon the mortgagee, if any such there be of record, of the notice required by paragraph 111 of this circular, the date and manner of service being stated, the entry will, without further notice, be canceled by the Commissioner of the General Land Office.

WIDOWS AND HEIRS OF ENTRYMEN.

48. The widows or heirs of persons who make entries under the reclamation law will not be required both to reside upon and cultivate the lands covered by the entry of the persons from whom they inherit, but they must reclaim the land as required by the reclamation law, and make payment of all unpaid charges when due.

49. Upon the death of a homesteader having an entry within an irrigation project, leaving no widow and only minor heirs, his right may, under section 2292, Revised Statutes, be sold for the benefit of such heirs. (See heirs of Frederic C. De Long, 36 L. D., 332.) If in such case the land has been divided into farm units, the purchaser takes title to the particular unit to which the entry has been limited, but if subdivision has not been made he will be required to conform the entry to one farm unit in the same manner as an

original entryman by amending the former entry, relinquishing to the United States or assigning to a duly qualified assignee the lands embraced in the entry in excess of the farm unit he elects to retain. The purchaser and his assignees take, subject to the payment of the water-right charges authorized by the reclamation law and regulations thereunder, and must reclaim the land as required by said law, but are not required otherwise to comply with the homestead law. Should the land not be sold for the benefit of the minor heirs, but retained by them, they will be required to show compliance with the requirements of law as to reclamation and payment of the charges.

FINAL PROOFS, CERTIFICATES, AND PATENTS.

50. Where the tract covered by a homestead or desert-land entry has been withdrawn under either the first or the second form after the date of said entry, the register and receiver are directed to immediately furnish the project manager a copy of any notice of intention to submit proof thereon, this being in addition to the copy furnished in all cases to the Chief of Field Division. The Reclamation Service may file such papers as are thought proper bearing on the question whether there has been such compliance with the law on claimant's part as entitles him to final certificate and patent on the entry. Final certificate will, in the absence of other objection, issue pursuant to the proof, as in other cases, if the testimony appears to warrant such action, and no papers have been filed by the Reclamation Service conducing to disprove the testimony; in the event of the filing of such papers, however, the record will be forwarded to the General Land Office for consideration.

51. Where an entry has been made after withdrawal of the tract under the second form, a copy of the notice of intention to submit proof will be sent to the project manager; in such cases the register and receiver will forward the proof, if found to be regular, to the General Land Office without issuance of final certificate, unless there has been submitted a final affidavit, duly corroborated by two witnesses and approved by the project manager, showing compliance with the reclamation act as to payment of all charges due to date and reclamation of one-half of the irrigable area in the entry, as provided for in paragraph 59. If such affidavit showing reclamation and payment of charges is filed and the final proof of compliance with the ordinary provisions of the homestead law as to residence, improvements, and cultivation is found on examination by the local land officers to be sufficient, they will issue final certificate on the case as hereinafter provided.

52. If any final proof offered under this law be irregular or insufficient, the register and receiver will reject it and allow the entryman the usual right of appeal, and if the General Land Office finds any proof forwarded to be insufficient or defective in any respect, whether or not final certificate has issued on the same, the final proof or certificate may be held for rejection or cancellation and the entryman will be notified of that fact, or he may be given an opportunity to cure the defect or to present acceptable proof.

53. The registers and receivers are directed to notify, in writing, every person who makes final proof on a homestead entry which is

subject to the limitations and conditions of the reclamation law embracing land included in an approved farm-unit plat where the entry does not conform to an established farm unit and where two years have elapsed since the approval of such farm-unit plat that 30 days from notice is allowed the entryman to elect the farm unit he desires to retain and to file an assignment of the remainder of his entry under the act of June 23, 1910 (36 Stat., 592), in default of which the entry will be conformed by the General Land Office and canceled as to the portion not assigned.

54. All persons who make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation law will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the lands, except that where entries were made prior to the issuance of public notice announcing the availability of water for the irrigation of the land and prior to June 25, 1910, in which case, under the departmental decision in the case of *ex parte* J. H. Haynes (40 L. D., 291) and under the provisions of the act of April 30, 1912 (37 Stat., 105), the submission of final proof is not required within the period during which proof must be submitted under the ordinary provisions of the homestead law.

55. Soldiers and sailors of the War of the Rebellion, the Spanish-American War, or the Philippine insurrection, and their widows and minor orphan children who are entitled to claim credit for the period of the soldier's or sailor's service under the homestead laws, will be allowed to claim credit in connection with entries made under the reclamation law, but will not be entitled to receive final certificate or patent until the water-right charges due have been paid and the requirements as to reclamation have been met.

56. Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead law and have submitted proof which has been found satisfactory thereunder by the General Land Office, but who are unable to furnish proof of reclamation because water has not been furnished to the lands or farm units have not been established, will be excused from further residence on their lands and will be given a notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry, as finally adjusted to an approved farm unit, and payment of all charges due under the public notices and orders issued in pursuance of the reclamation law.

57. The act of August 9, 1912 (37 Stat., 265), expressly requires reclamation of one-half of the irrigable area of the entry as finally adjusted before final certificate and patents may issue thereunder, and, therefore, the act does not authorize the issuance of final certificate on homestead entries made subject to the reclamation law, prior to the establishment by the Secretary of the Interior of farm units, and the conformation of the entry to an approved unit, for the reason that prior to that time the entry is still subject to adjustment in area, and it can not be determined what area must be ultimately reclaimed under the provisions of the act.

58. Upon the tendering to registers and receivers of homestead proof on entries subject to the reclamation law, they will accept only

the testimony fees for "reducing testimony to writing and examining and approving testimony," and will not accept final commissions payable under such entries until proof is received of compliance with the requirements of the reclamation law as to reclamation and payment of the charges which have become due.

59. Homestead and desert-land entrymen, in making proof of compliance with the reclamation law as to reclamation and payment of reclamation charges due, must submit an affidavit, duly corroborated by two witnesses, in duplicate, to the project manager showing these facts. Thereupon it shall be the duty of the project manager to verify the statement as to payment and also make such examination of the land as will enable him to determine whether reclamation as required by law and the regulations has been made. If he finds that the statement as to payment be correct he will so certify, which certificate will also show the date on which the next payment is due; but if he finds that all payments have not been made as required he will advise the entryman thereof, requiring him to pay the amounts found to be unpaid and due, with a right of appeal in the entryman from such requirement to the Director of the Reclamation Service and ultimately to the Secretary of the Interior. Should he find that reclamation has been accomplished he will so certify, but if he finds that reclamation has not been accomplished as required he will forward the proofs to the register and receiver of the land district in which the land is situate, with his report or findings thereon, and such officers will thereupon in turn transmit the showing to the General Land Office for its action. If the proof be rejected by the Commissioner of the General Land Office, appeal will lie to the Secretary of the Interior, as in other cases provided, it being the purpose to issue final certificate upon any such entry only after a final determination that all water charges due on account thereof have been paid and that reclamation has been accomplished as required by the reclamation law. Where prior to issuance of public notice water has been furnished on a water-rental basis to reclamation entrymen or others, and by means whereof reclamation sufficient to obtain patent or water-right certificate under the act of August 9, 1912, has been accomplished and satisfactory proof made, water-right applications may be received from such entrymen or others desiring to obtain patent or water-right certificate under that act upon the form of application approved by the department, modified so as to refer to the irrigable acreage and the charge per acre as thereafter announced by the Secretary. In such cases reclamation homestead entries must be conformed to farm units as established by the Secretary of the Interior. If not theretofore created, farm units may be established upon application.

60. To comply with the provisions of the reclamation law as to reclamation and cultivation, the land must be cleared of brush, trees, and other encumbrances, provided with sufficient laterals for its effective irrigation, graded and otherwise put in proper condition for irrigation and crop growth, planted, watered, and cultivated, and during at least two years next preceding the date of approval by the project manager of proof of reclamation, except as prevented by hailstorm or flooding, satisfactory crops must be grown on at least one-half of the irrigable area thereof. A satisfactory crop during any year shall be any one of the following: (a) A crop of

annuals producing a yield of at least one-half of the average yield on similar land under similar conditions on the project for the year in which it is grown; (b) a substantial stand of alfalfa, clover, or of other perennial grass substantially equal in value to alfalfa or clover; or (c) a season's growth of orchard trees or vines of which 75 per cent shall be in a thrifty condition.

61. As to all lands subject to the reclamation extension act of August 13, 1914 (38 Stat., 686), at least one-quarter of the irrigable area thereof shall be so reclaimed within three full irrigation seasons after entry or making water-right application, and at least one-half of the irrigable area thereof so reclaimed within five full irrigation seasons after entry or making water-right application, except that the first full irrigation season affecting such land for which water-right application shall have been made prior to May 3, 1915, shall be the irrigation season of 1915. All land thus reclaimed and cultivated shall continue to be so reclaimed and cultivated until after final proof is made and accepted or patent or final water-right certificate issued. Failure to so reclaim lands subject to the said reclamation extension act renders the entry, or, in case of private land, the water-right application therefor, subject to cancellation.

62. Upon receipt of proof of reclamation and payment of water-right charges as provided in the acts of August 9, 1912, and August 26, 1912, in case of homestead entries under the reclamation law, on ceded Indian lands entered under the reclamation act, and in case of desert-land entries within the exterior limits of any land withdrawal or irrigation project under the reclamation act, if final proof of compliance with the homestead or desert-land law, as the case may be, has been previously submitted and has been accepted by the Commissioner of the General Land Office, or if such final proof is submitted at the time of the receipt of proof of reclamation and payment of charges, and is found to be sufficient as to residence, improvement, and cultivation upon examination by the local land officers, the register and receiver will issue final certificate on the entry, proceeding in the usual manner, and forward the same with the proof of reclamation and payments to the General Land Office. The final certificate so issued must be stamped by the local land officers across the face of each certificate when issued as follows: "Subject to lien, under section 2, act of August 9, 1912 (37 Stat., 265)." Upon receipt of such case in the General Land Office, if found to be regular, it will be approved for patent under said act of August 9, 1912, or August 26, 1912, and patent issued reserving the lien as in said acts provided.

63. Upon receipt of proof of reclamation and payment of water-right charges, as provided in the act of August 9, 1912, in the case of homestead entries, other than those under the reclamation act, where a water-right application has been filed by the entryman, and the register and receiver have been notified by the project manager of the acceptance of such application, if final proof has been accepted on the entry by the Commissioner of the General Land Office, or final proof is submitted at the time of the receipt of such reclamation proof and is found to be sufficient on examination by the local land officers, the register and receiver will issue final certificate of compliance with the homestead law, proceeding in the usual manner, and forward such final certificate, with proof of reclamation, to the Gen-

eral Land Office. When the case is received in the General Land Office and is found to be regular, it will be approved for patent and final water-right certificate will be issued by the project manager, reserving a lien to the Government and its successor for the charges due or to become due.

64. The execution of final water-right certificate has the effect of vesting in the water-right applicant absolute title to the water right involved, subject in case of partial payment to a lien for the payment of all sums still due, and in all cases to payment of the annual charges for operation and maintenance; hence the necessity for extreme care in the preparation and issuance of these instruments.

65. The certificate should not be executed until the following notation (record completed —) has been initialed by a responsible employee who shall have ascertained from a careful examination of the project records that full compliance has been made with the requirements of the law such as to entitle the applicant to the issuance of such certificate.

66. Upon the execution of the certificate, and before delivery to the water-right applicant, it should be recorded in the bound volume which has been provided for that purpose, care being exercised to make the record an exact copy of the original certificate. The person preparing the certificate and recording the same should initial the certificate and record, and will be held responsible for absolute accuracy in this respect; and to insure this the original should be checked with the record thereof in the bound volume. *The original must not be delivered until the signature has been copied on the record.*

67. It will be necessary to keep a complete index of final water-right certificates issued. A double card index should be made for this purpose, one under the names of the parties and the other by land descriptions.

68. These record books are the official record of the United States in respect of water rights under reclamation projects and serve a purpose similar to that of the records of county recorders or of the records of the Recorder of Patents in the General Land Office. Certified copies of the record will be frequently called for, and it must be absolutely accurate, every precaution being taken to this end.

69. When final water-right certificate has been issued and recorded the fact should be noted on the back of the water-right application forming the basis thereof, citing the volume and page where recorded.

70. Final water-right certificates are not required for and will not be issued for (a) lands entered under the reclamation act; (b) desert-land entries for which water-right application has been made; (c) entries of ceded Indian lands, whether patents for such lands are issued under acts of August 9, 1912, or otherwise, but patent in each of such cases carries with it the water right to which the lands patented are entitled. In all other cases, that is, in cases of lands in private ownership, and in cases of homesteads where entry was made prior to the reclamation withdrawal, final water-right certificate will issue as herein provided.

71. In case of lands in private ownership and homestead entries made prior to reclamation withdrawal, reclamation is required to be shown before any final water-right certificate is issued upon a

water-right application made for such lands under the reclamation law. Further, before issuance of such a certificate under the act of August 9, 1912 (37 Stat., 265), on account of any lands so held, evidence must be filed satisfactorily showing that the applicant for water right has an unencumbered title to the land, or, where encumbered, the consent of the encumbrancers must be furnished in such form that the lien to be given the Government to secure the deferred payments on account of the water right shall, as contemplated by the law, constitute a prior lien upon the land. Upon the filing of such proofs with the project manager and the payment of all reclamation charges then due, he will issue a water-right certificate to the applicant which shall expressly reserve to the United States a prior lien on the land upon which a water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or demands whatsoever, to secure the payment of all sums due or to become due, to the United States or its successors. The project manager will forward all papers, including a copy of the certificate, to the Director of the Reclamation Service.

72. The Director of the Reclamation Service will, upon the full payment of all construction or building and betterment charges by any water user, issue certificate of the full payment of such charges releasing the lien therefor reserved in the final water-right certificate or patent under the act of August 9, 1912 (37 Stat., 265).

WATER RIGHTS.

73. In pursuance of the authority contained in the act of August 9, 1912 (37 Stat., 265), a special fiscal agent of the Reclamation Service has been designated to receive payment of the construction or building and betterment charges and the charges for operation and maintenance payable on account of the lands within each project. All administrative matters regarding the filing of original water-right applications and all actions regarding water-right applications heretofore filed shall be carried on by the officer of the Reclamation Service in charge of the project, herein designated as project manager. Appeals from his action may be taken in accordance with paragraphs 148 to 153, inclusive.

74. Notice of all action in the local land office or in the General Land Office regarding any entry for which water-right application has been made, or may be made, whether subject to the reclamation law or not, shall be given immediately by the register and receiver to the project manager by the forwarding of copy of decision in the case. The project manager shall advise the register and receiver of all action regarding any water-right application or contract by the Reclamation Service affecting the status or validity of the homestead or desert-land entry covering the lands. Among the several actions of which the register and receiver are especially directed to notify the project manager are:

1. Allowance of entries.
2. Conformation of entries to farm units.
3. Acceptance of final proof.
4. Issuance of final certificate.

5. Issuance of patent.

6. Acceptance or rejection of assignments under the act of June 23, 1910 (36 Stat., 592).

7. Contests against entries, granting of leave of absence, death or disability of entryman, or any other actions materially affecting the entry.

75. The control of operation of all sublaterals constructed or acquired in connection with projects under the reclamation law is retained by the Secretary of the Interior to such extent as may be necessary or reasonable to assure to the water users served therefrom the full use of the water to which they are entitled. (See 37 L. D., 468.)

WATER RIGHTS FOR LANDS IN PRIVATE OWNERSHIP.

76. Lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the reclamation law, but water-right contracts may not be held for more than 160 acres by any one landowner, and such landowner must be an actual bona fide resident on such land or occupant thereof residing in the neighborhood at the time of making such water-right contract. The Secretary of the Interior has fixed a limit of residence in the neighborhood at a maximum of 50 miles. This limit of distance may be varied, depending on local conditions. After water-right application has been made and accepted (which constitutes a water-right contract), the applicant is not required to continue his residence on the land or in the neighborhood. A landowner may, however, be the purchaser of the use of water for more than one tract in the prescribed neighborhood at one time, provided that the aggregate area of all the tracts involved does not exceed the maximum limit established by the Secretary of the Interior, nor the limit of 160 acres fixed by the reclamation law; and a landowner who has made contract for the use of water in connection with 160 acres of irrigable land and sold the same, together with the water right, can make other and successive contracts for other irrigable lands owned or acquired by him. Holders of more than 160 acres of irrigable land, or more than the limit of area per single ownership of private land as fixed by the Secretary of the Interior, for which water may be purchased within the reclamation project, if such a limit has been fixed, must sell or dispose of all in excess of that area before water-right application will be accepted from such holders. (See pars. 91 and 99.) If the holder of a greater area desires, he can subscribe for stock in the local water users' association (if there be one) for his entire holding, executing a trust deed, giving the association power to ultimately sell the excess area to actual settlers who are qualified to comply with the reclamation law, unless the land has been sold by the owner when the Government is ready to furnish water thereon, or provide for the disposal of such excess holdings in some manner approved by the Secretary of the Interior. Holders of land in private ownership who have made and had accepted water-right application for their holdings may receive water for lands in excess of the area hereinabove stated, in case such excess lands have had water-right application made and accepted therefor, and have been acquired by descent, will, or by foreclosure.

of any lien; in which case said excess lands may be held for two years and no longer after their acquisition, without in any manner militating against the right of the holder to be furnished water under the reclamation law.

77. Where private lands are held under contract of purchase, title remaining in the vendor, and the purchaser makes water-right application therefor, making one or more payments on account of the construction or building charge, and subsequently the vendor cancels the contract of purchase because of default in payments or for other default of the purchaser, the land resumes its status as if no contract of purchase had been entered into and no water-right application had been made. All payments made by the contract purchaser on account of the water-right application are forfeited to the United States. If the tract is resold to new purchasers, whether by deed or by contract of purchase, such new purchaser must make a new water-right application under such regulations as are in force at the time.

78. A different result occurs where the contract purchaser sells his interest under the contract to another and transfers in writing credit for payments made by him and this other and the vendor enter into a new arrangement whereby this other takes a new contract of purchase from the vendor. In this case the new contract purchaser is the successor in interest of the original contract purchaser and succeeds to the benefits of any payments made by the original contractor on his water-right application. If, therefore, in such a case a new water-right application is required because of any regulations applicable to the case, credits should be allowed on the new application to the extent of the payments made by the original contract purchaser.

79. The purpose of the reclamation law is to secure the reclamation of arid or semiarid lands and to render them productive, and section 8 declares that the right to the use of water acquired under this act shall be appurtenant to the land irrigated and that "beneficial use shall be the basis, the measure, and the limit of the right." There can be no beneficial use of water for irrigation until it is actually applied to reclamation of the land. The final and only conclusive test of reclamation is production. This does not necessarily mean the maturing of a crop, but does mean the securing of actual growth of a crop. The requirement as to reclamation imposed upon lands under homestead entries applies likewise to lands in private ownership and land entered prior to the withdrawal—namely, that the landowner shall reclaim his land as required by law, and no right to the use of water will permanently attach until such reclamation has been shown. (See 37 L. D., 468, and par. 60.)

80. The provisions of section 5 of the act of June 17, 1902, relative to cancellation of entries with forfeiture of rights for failure to make any two payments when due state the rule to govern all who receive water under any project, and accordingly a failure on the part of any water-right applicant to make any two payments when due shall render his water-right application subject to cancellation with the forfeiture of all rights under the reclamation law as well as of any moneys already paid to or for the use of the United States upon any water right sought to be acquired under said law. (37 L. D., 468.)

VESTED WATER RIGHTS.

81. The provision of section 5 of the act of June 17, 1902 (32 Stat., 388), limiting the area for which the use of water may be sold, does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.

WATER-RIGHT APPLICATION.

82. The department has adopted two forms of applications for water rights, viz, Form A, for homestead entries under the reclamation law; Form B, for lands other than homestead entries under the reclamation law embraced within a project. Copies of these forms have been furnished project managers, and they will be used in all applications for water rights on all reclamation projects.

83. Under the act of April 30, 1912 (37 Stat., 105), a reclamation homestead entry made prior to June 25, 1910, where a residence was established in good faith, is not subject to contest for failure of the entryman to maintain residence or make improvements upon the land prior to the time when water is available for the irrigation of the lands embraced within the entry under public notice. The entryman is required within 90 days after public notice has issued to file a water-right application. (See par. 29.)

84. Upon notice issued by the Secretary of the Interior that the Government is ready to receive applications for water right for described lands under a particular project, all persons who have made entries of such lands under the provisions of the reclamation law will be required to file application for water rights on Form A for the number of acres of irrigable land in the farm unit entered, as shown by the plats of farm units approved by the Secretary of the Interior. And any person settled on such lands or intending to make entry of any such lands may file application for water rights on Form A for the number of acres of irrigable land in the farm unit settled on or intended to be entered, as shown by such farm-unit plats.

85. Where such settler or other person makes a water-right application before initiating entry for the lands for which such water-right application is made, the water-right application will be received by the project manager, and the amount due thereon as shown by the public notices and orders collected by the special fiscal agent of the Reclamation Service. The water-right application will be retained by the project manager until entry is made, or if entry is not perfected by the applicant within 30 days the application shall be indorsed "rejected," with the date thereof, and the amount collected returned to the applicant, except in case water shall have been furnished such applicant under the application, in which case only the amount collected on account of the construction or building and betterment charges will be returned. The amount collected for operation and maintenance will be retained by the special fiscal agent as payment to the United States for the service rendered in furnishing water. If entry is made the entryman will be required to exhibit to the project manager his land-office receipt. The project

manager will indorse on the water-right application the number, date, and land-office serial number of the entry and take the action indicated in the following paragraph.

86. All applications on Form A must be filed in the project office of the United States Reclamation Service in person or by mail, accompanied by two complete copies and the amount due thereon as shown by the public notices and orders. The project manager will carefully examine the original application, and if regularly and properly made out accept the same and indorse thereon his acceptance. He will see that the copies correspond with the original and that the entry number, date, etc., are properly given, and will immediately transmit one copy to the director and give the second copy to the applicant, with the special fiscal agent's receipt for the amount collected. The original application will be retained in the project office of the Reclamation Service.

87. Upon the issuance of the public notice private landowners and entrymen whose entries were made prior to withdrawal may, in like manner, apply to the project office of the United States Reclamation Service, on Form B for water rights for tracts not containing more than 160 acres of irrigable land, according to the approved plats, unless a smaller limit has been fixed as to lands in private ownership by the Secretary of the Interior.

88. Each application on Form B must contain a statement as to the distance of the applicant's residence from the land for which a water right is desired.

89. If a greater distance than that fixed for the project is shown in any application, the case should be reported to the director through the chief of construction for special consideration upon the facts shown. If the applicant is an actual bona fide resident on the land for which water-right application is made, the clause in parentheses of Form B, regarding residence elsewhere, must be stricken out.

90. The applicant on Form B must state accurately the nature of his interest in the land. If this interest is such that it can not be perfected into a fee simple title at or before the time when the last annual installment for water right is due, the application must be rejected.

91. Form B, used by owners of private land and entrymen whose entries were made prior to the withdrawal of the land within reclamation projects for entering into contracts with the United States for the purchase of a water right, must be signed, sealed, and acknowledged before a duly authorized officer in the manner provided by local law. A space is provided on the blank for evidence of the acknowledgment, which should be in exact conformity to that prescribed for mortgages by the law of the State in which the lands covered by the contract lie. When so executed, the original must be filed in the project office of the United States Reclamation Service either in person or by mail, together with four complete copies, and must be accompanied by the amount of the charges for recording the same in the county records. The application must cover all the irrigable land of the applicant in the project. (See pars. 76 and 99.) If the applicant owns more than the limit of irrigable area fixed for land in private ownership, he must make disposition of all the irrigable lands not covered by his applica-

tion, as indicated in paragraph 76, before the application is accepted. If the application is (a) regular and sufficient in all respects; (b) bears the certificate of the secretary of the local water users' association in cases where such certificate is required; (c) is accompanied by the proper payments required by the provisions of the public notices and orders issued in connection with the project and the recording fees; the project manager will accept the same by filling out the blank provided and attaching his signature and seal and placing a scroll around the word "Seal," whereupon the water-right application becomes a water-right contract.

92. Attention is especially called to sections 3743 to 3747, inclusive, of the Revised Statutes, relative to the deposit and execution of public contracts. The project manager will immediately after execution of the contract execute the oath of disinterestedness required by section 3745, Revised Statutes, before a duly authorized officer on the blank form provided on the last page of the water-right contract on one of the copies. No funds are available for the payment by the Government of any fees in connection with this oath, and the project manager should therefore take such oath before some officer or clerk of the Reclamation Service, who is a notary public, during his office hours, for which service such officer or clerk is precluded from charging or receiving a fee. If it becomes necessary to take this oath before any other authorized officer, the fee due such officer must be paid to him by the water-right applicant, and the project manager is authorized to refuse to accept the water-right application on failure of the applicant to make such payment.

93. Section 3744, Revised Statutes, makes it the duty of a public officer executing a contract on behalf of the United States to file a copy of the same in the returns office of this department as soon as possible and within thirty days after the making of the contract, and the project manager will therefore forward direct to that office the copy of the contract on which he has executed the oath of disinterestedness, as above directed, as soon as possible after the execution of the same. The provision of said section requiring that all papers in relation to each contract shall be attached together by a ribbon and seal and marked by numbers in regular order, according to the number of papers composing the whole return, does not apply to the contracts for the purchase of water rights, because of the fact that only one paper is used.

94. As stated in the instructions for the execution of the blank, the contract must be duly recorded in the records of the county in which the lands are situated, and, therefore, immediately upon execution of the contract the original will be transmitted by the project manager to the proper county officer to be recorded.

95. Upon return of the original copy of the contract to the project manager, bearing certificate at the bottom of the last page executed by the recording officer, showing the recordation of the instrument, the project manager will fill out the same blank on the three copies held in his office, signing the name of the recording officer with the word "signed" in parentheses preceding such name. The original and one copy, when thus completed, will be sent to the director, who will transmit the original to the Auditor of the Treasury Department for the Interior Department, and one of the other copies will be for-

warded to the applicant, and the last copy must be retained by the project manager.

96. When application is filed by an assignee of an entryman under the reclamation act, and the assignee proposes to claim credit for any payment made by the assignor, the prior applicant should execute the following form at the bottom of the last page, either written in ink or typewritten:

I, _____, for value received, hereby sell and assign to _____ all my right, title, and interest in and to any credits heretofore paid on water-right application No. _____ for the above-described land, together with all interests possessed by me under said application.

Assignor.

Witness.

97. Action on cases bearing such assignment will be the same as on other cases, except that the assignment must be permissible under the provisions of existing public notices and departmental regulations and orders. After final proof of reclamation and application for patent under act of August 9, 1912, no water-right application is required of the assignee.

98. In order to avoid discrepancies in areas and resulting payments and the acceptance of applications for tracts not designated as lands for which water can be furnished, the project manager, before accepting water-right applications on any of the forms, must assure himself of the correctness of all allegations in the application so far as can be determined by the records in his office.

99. With reference to water-right applications for land in private ownership, including entries not subject to the reclamation law, the project manager must assure himself, so far as practicable from the information available in his office, that the application includes all the land owned by the applicant within the project and open to application for a water right, not exceeding the limit of area fixed by the reclamation act and the public notice in pursuance of which the application is presented, and in case of excess holdings that proper action has been taken with reference thereto. (See pars. 76 and 91.)

WATER-RIGHT CHARGES.

100. The Secretary of the Interior will at the proper time, as provided in section 4 of the act of June 17, 1902, fix and announce the area of lands which may be embraced in any entry thereafter made or which may be retained in any entry theretofore made under the reclamation law and the charges which shall be made per acre for the irrigable lands embraced in such entries and lands in private ownership, for the building of the works, and for operation and maintenance and prescribe the number and amount and the dates of payment of the annual installments thereof.

101. Under the act of February 13, 1911 (36 Stat., 902), the Secretary is authorized in his discretion to withdraw any public notice issued prior to the passage of that act.

102. If any entry subject to the reclamation law is canceled or relinquished, the payment for water-right charges already made and not assigned in writing to a prospective or succeeding entryman under

the provisions of paragraph 109 hereof are forfeited. All water-right charges which remain unpaid are canceled by the relinquishment or cancellation of the entry, except as provided by the specific provisions of public notices applicable to particular projects.

103. In cases where water-right application has been made and the irrigable area is subsequently ascertained to be greater than that stated therein, action should be taken as follows:

(1) For land covered by water-right application reserving a lien to the United States, the water users should execute a supplemental contract of the form given below and the same shall be recorded in the county records at the expense of the United States.

(2) For land covered by water-right application not reserving a lien to the United States, the water user should execute application on the form of water-right application in current use, and the same shall be recorded in the county records at the expense of the United States.

The form of supplemental contract approved is as follows:

AGREEMENT.

Know all men by these presents: For and in consideration of one dollar (\$1), the receipt of which is hereby acknowledged, _____ and _____, his wife, of _____, hereby agree with the United States, its successors and assigns, that the irrigable acreage shown in Government water-right application, made in pursuance of the reclamation act (32 Stat., 388), No. _____, dated _____ and filed for record _____, page _____, of deeds of the records of _____ County, _____, shall be, and hereby is, corrected from _____ acres to _____ acres, and the first installment of the charge for construction or building, operation, and maintenance shall become due on the next installment date after the amendment takes place.

Done this _____ day of _____, 19____

STATE OF _____,
County of _____, ss:

Before me, _____, a notary public, personally appeared _____ and _____, his wife, who acknowledged to me that they executed the above instrument as their free and voluntary act for the purpose as set for therein.

In witness whereof I have hereto affixed my hand and placed my seal _____ day of _____

Notary Public in and for _____

Approved:

WATER USERS' ASSOCIATION,

_____, Secretary.

Accepted:

Project Manager, United States Reclamation Service.

104. Any person who applies to enter the same land at the time of relinquishment and at the same time files an assignment in writing of the charges theretofore paid will be allowed credit therefor. If the application to enter is made at a later date or is not accompanied by a written assignment of credits, the applicant must pay the water-right charges as if the land had never been previously entered.

105. In case of the sale of all or any part of the irrigable area of a tract of land in private ownership covered by a water-right application which is not recorded in the county records, the vendor will be

required to have his transferee make new water-right application for the land transferred. Upon acceptance of such new water-right application the transfer will be duly noted, and in case of transfer of part the water-right charges under the original application of the vendor will be adjusted to the respective tracts. If the vendor's water-right application has been recorded on the county records, the vendee will not be required to make new water-right application.

106. Where payment is tendered for a part only of either an annual installment of water-right construction or building charges or an annual operation and maintenance charge, the same may be accepted if the insufficient tender is, in the opinion of the project manager, caused by misunderstanding as to the amount due and approximates the same.

107. In all cases of insufficient payment accepted in accordance with the provisions of the foregoing paragraph, receipts must issue for the amount paid and the water user shall be immediately notified by registered letter that the payment is insufficient and allowed a period of 30 days to make payment of the balance due to complete the charge on which a part payment has been made. If the balance of either such installments is paid within this period, additional receipt must issue therefor, but if either or both installments remain unpaid for 30 days, report shall be made to the director. In all other cases where insufficient tenders are made they shall be rejected with notice to the water user of the reason for the rejection.

108. When full payment is tendered and, upon examination, is found to be correct, the special fiscal agent will issue receipt therefor.

109. A person who has entered lands under the reclamation law, and against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not subject to cancellation under this act, may relinquish his entry to the United States and in writing assign to a prospective or succeeding entryman any credit he may have for payments already made under this act on account of said entry, and the party taking such assignment may, upon making proper entry of the land at the time of the filing of the relinquishment, if subject to entry, receive full credit for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the reclamation law. Under this paragraph credit may be allowed in cases of assignment where the water-right application has been made under the reclamation extension act; and also, in case of new entry under the act of March 4, 1915 (38 Stat., 1215). (See departmental instructions, Dec. 20, 1915, 44 L. D., 544.)

110. The transfer of lands in private ownership covered by water-right contract before cancellation of the contract carries with it the burden of water-right charges and credit for the payments made by the prior owner. (See departmental decision, Mar. 20, 1911, in the case of Fleming McLean and Thomas Dolf, 39 L. D., 580.) After any such transfer water will continue to be delivered for the entire irrigable area of the tract transferred and tract retained, at the same place or places as delivery was theretofore made, and no change will be made in the place of delivery except upon compliance with the provisions of paragraphs 113 and 114 regarding the additional expense for laterals, division boxes, surveys, or for other purposes, and for providing rights of way for irrigation or drainage ditches across the portions transferred or retained.

NOTICE OF INSTALLMENTS DUE.

111. At least 30 days prior to the date on which any installment of the construction or building charge becomes payable, under the terms of any public notice or order, by any water-right applicant under a project, a notice will be mailed to each such water user at his last known post-office address as shown on the Reclamation Service project records, which notice will state the amount of construction or building charge due at the date of the notice and the amount to become due when the next succeeding installment of the construction or building charge is due. In all cases of water-right application upon which two payments of reclamation charges have become due, under any public notice or order under which such application has been made, and remain unpaid on the day after the second of such payments becomes due, a notice will be sent as soon as practicable and in no case later than the first of the following month. Such notice shall be sent by registered mail to the applicant at his last known address, as above indicated, which notice will state the amount of reclamation charges then due, and that unless, on or before the thirtieth day following that on which the notice is sent, payment be made of the amount due in excess of one full installment the following action will be taken: (a) In case of reclamation homestead entryman, that the entry and the accompanying water-right application will be canceled without further notice, or (b) in cases other than those of reclamation homestead entrymen the case will be reported to the Secretary of the Interior with recommendation for appropriate action by suit to recover the amount due, and also, if such action is deemed advisable, for the cancellation of the water-right application. The rules of practice so far as they are not in conformity herewith are hereby modified. The registry return receipts of each such notice will be preserved and promptly after the expiration of the time allowed in the notice to make payment will be forwarded to the Director of the Reclamation Service with copy of notice sent in each case of delinquency and with report and recommendation relative to cancellation or other action to be taken against the delinquent. In case such a notice is returned unclaimed by the addressee such unclaimed notice should accompany the other papers. In case the registry return receipt is not received, or, being received, has been lost, a new notice must be sent. The director will take appropriate action in each case. If the entry is subject to cancellation he will forward appropriate statement to the Commissioner of the General Land Office with evidence of service. The bills for operation and maintenance will be similarly rendered with reference to the due date of March 1 of each year and will be handled in the same manner.

CREDITS FOR PAYMENTS ON RELINQUISHMENT.

112. A homestead entryman subject to the reclamation law may relinquish part of his farm unit if in the judgment of the Secretary of the Interior it would not jeopardize the interests of the United States in the collection of the charges against the part proposed for relinquishment or otherwise. The portions of the payments theretofore made by him on account of the construction or building charge applicable to the relinquished area will be credited as fol-

lows: First, upon the portion of the charges for operation and maintenance then due against the relinquished area, and second, any remainder will be credited upon the construction or building charge against the area retained. In no case will payments theretofore made on account of operation and maintenance charges be so credited. The entryman desiring to make such relinquishment shall submit to the project manager his application therefor. The project manager will transmit such application with his recommendation through proper channels to the Director of the Reclamation Service for approval and submission to the department for authority to amend the farm unit plat.

113. Where an entryman, whose entry is not subject to the reclamation law, relinquishes part of the land included in his entry, appropriate notation will be made on his water-right application showing such relinquishment, and his charges thereafter due will be reduced accordingly upon presenting to the project manager certificate of the local land office showing the lands relinquished and the lands remaining in his entry. If entry is made for the relinquished portion at the time of filing the relinquishment the new entryman will receive credit for payments made thereon if assignment in writing is filed, as provided in paragraphs 96 and 107 of these regulations. No credit will be allowed if the new entry is not filed at the time of relinquishment.

114. No authorization for allowance of credits as hereinabove provided will be made which will, in the judgment of the Secretary of the Interior, impose any additional expense whatever upon the United States for the construction of laterals and division boxes, or for the making of surveys or for other purposes. Where such relinquishment would involve additional expenses on the part of the United States in order to irrigate either the retained or the relinquished portion of the farm unit the applicant may deposit from time to time, in advance, as required by the project manager, payment of the estimated amount necessary to provide for the proper irrigation of either portion of the farm unit, and, in such case, if the application is not otherwise objectionable, the same will be allowed.

115. Every such relinquishment shall be subject to the following conditions: (a) That the relinquishing entryman and his successors in title shall permit the entryman then or thereafter entering the relinquished part to use the irrigating and drainage ditches and other irrigation works existing on the retained part at the time of relinquishment, whenever in the opinion of the project manager such use is reasonably necessary for the irrigation and drainage of the relinquished part; and the entryman then or thereafter making entry of the relinquished part shall have right of way over the retained portion for the necessary operation and maintenance of such ditches, drains, and irrigation works; (b) that the entryman then or thereafter entering the relinquished part shall have a right of way over the retained part for the construction, operation, and maintenance of such additional ditches, drains, and other irrigation works as the project manager may from time to time consider reasonably necessary or proper to be constructed upon or through the retained part for the irrigation and drainage of the relinquished part.

DESERT-LAND ENTRIES WITHIN A RECLAMATION PROJECT.

116. By section 5 of the act of June 27, 1906 (34 Stat., 519), it is provided that any desert-land entryman who has been or may be directly or indirectly hindered or prevented from making improvements on or from reclaiming the lands embraced in his entry, by reason of the fact that such lands have been embraced within the exterior limits of any withdrawal under the reclamation act of June 17, 1902, will be excused during the continuance of such hindrance from complying with the provisions of the desert-land laws.

117. This act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project, or by any withdrawal of public lands under the reclamation law, from improving or reclaiming the lands covered by their entries.

118. No entryman will be excused under this act from a compliance with all of the requirements of the desert-land law until he has filed in the local land office for the district in which his lands are situated an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and extent of the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge.

119. The register and receiver will at once forward the application to the project manager of the project under which the lands involved are located and request a report and recommendation thereon. Upon the receipt of this report the register and receiver will forward it, together with the applicant's affidavit and their recommendation, to the General Land Office, where it will receive appropriate consideration and be allowed or denied as the circumstances may justify.

120. Inasmuch as entrymen are allowed one year after entry in which to submit the first annual proof of expenditures for the purpose of improving and reclaiming the land entered by them, the privileges of this act are not necessary in connection with annual proofs until the expiration of the years in which such proofs are due. Therefore, if at the time that annual proof is due it can not be made, on account of hindrance or delay occasioned by a withdrawal of the land for the purpose indicated in the act, the applicant will file his affidavit explaining the delay. As a rule, however, annual proofs may be made, notwithstanding the withdrawal of the land, because expenditures for various kinds of improvements are allowed as satisfactory annual proofs. Therefore an extension of time for making annual proof will not be granted unless it is made clearly to appear that the entryman has been delayed or prevented by the withdrawal from making the required improvements; and, unless he has been so hindered or prevented from making the required improvements, no application for extension of time for making final proof will be granted until after all the yearly proofs have been made.

121. An entryman will not need to invoke the privileges of this act in connection with final proof until such final proof is due, and if at that time he is unable to make the final proof of reclamation

and cultivation, as required by law, and such inability is due, directly or indirectly, to the withdrawal of the land on account of a reclamation project, the affidavit explaining the hindrance and delay should be filed in order that the entryman may be excused for such failure.

122. When the time for submitting final proof has arrived and the entryman is unable, by reason of the withdrawal of the land, to make such proof, upon proper showing, as indicated herein, he will be excused, and the time during which it is shown that he has been hindered or delayed on account of the withdrawal of the land will not be computed in determining the time within which final proof must be made.

123. If after investigation the irrigation project has been or may be abandoned by the Government, the time for compliance with the law by the entryman will begin to run from the date of notice of such abandonment of the project and of the restoration to the public domain of the lands which had been withdrawn in connection with the project. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entryman may comply with all provisions of the reclamation law, and must relinquish or assign all the land embraced in his entry in excess of 160 acres; and upon making final proof and complying with the terms of payment prescribed in said law, he shall be entitled to patent, and final water-right certificate containing lien as provided for by the act of August 9, 1912, and act of August 26, 1912.

124. Under the act of July 24, 1912 (37 Stat., 200), desert-land entries covering lands within the exterior limits of a Government reclamation project may be assigned in whole or in part, even though water-right application has been filed for the land in connection with the Government reclamation project, or application for an extension of time in which to submit proof on the entry has been submitted under the act of June 27, 1906 (34 Stat., 519), requiring reduction of the area of the entry to 160 acres.

125. Where it is desired to assign part of a desert-land entry which has been designated as a farm unit, application for the amendment of the farm-unit plat should be filed with the project manager, as in the case of assignments of homestead entries. (See pars. 37 to 39.) The same disposition of amendatory diagrams will be made and the same procedure followed as provided for assignments of homestead entries.

126. Assignments of desert-land entries made and filed in accordance with these regulations must be noted on the local land-office records and at once forwarded to the General Land Office for immediate consideration under paragraphs 14 to 16, inclusive, of the circular approved September 30, 1910, and reprinted with additions to March 23, 1914, entitled "Statutes and Regulations Governing Entries and Proof Under the Desert-Land Laws." Assignments filed in local land offices prior to July 24, 1912, will be recognized and accepted, if found to be regular, without compliance with these regulations. All assignments filed on or after the date of the passage of the act must comply herewith.

127. Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the reclamation law, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation.

128. Desert-land entrymen within exterior boundaries of a reclamation project who expect to secure water from the Government must relinquish or assign all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office, and must reclaim one-half of the irrigable area covered by their water right in the same manner as private owners of land irrigated under a reclamation project.

TOWN-SITE SUBDIVISIONS.

129. Where water-right application has been made and accepted for land in private ownership, no new water-right application by any purchaser of part of the irrigable area of such private land will be accepted for land so purchased, if the same is subdivided into lots of such form and area as to indicate a use thereof for town-site rather than for agricultural or horticultural purposes. In such case no notation shall be made of such transfer on the original water-right application, but water will be furnished such land on the original application, and the water-right charges collected thereunder as if no such sale or sales had been made.

130. Water for land subdivided into such form and areas as to indicate a use thereof for town-site rather than for agricultural or horticultural purposes may be procured for the entire areas so subdivided by contract with the Reclamation Service through the proper representatives of the landowners, as authorized by the Secretary of the Interior under the acts of April 16 and June 27, 1906 (34 Stat., 116 and 519).

131. Where separate water-right applications, otherwise valid, have been accepted for lands subdivided into such form and areas as indicate a use thereof for town-site rather than for agricultural and horticultural purposes, such water-right applications and the corresponding subscriptions to the stock of the water users' association may be surrendered and canceled, and water supplied to such lands under the provisions of the said acts of April 16 and June 27, 1906, upon such terms and conditions as will return to the "reclamation fund" an amount not less than the charges due under such water-right applications. Similar adjustment by cancellation and new contract may be made where water-right application has been accepted and the land has been subsequently subdivided into tracts of form and area as above.

TOWN SITES IN RECLAMATION PROJECTS.

132. *Withdrawal, survey, appraisalment, and sale.*—Town sites in connection with irrigation projects may be withdrawn and reserved by the Secretary of the Interior under the acts approved April 16 and June 27, 1906 (34 Stat., 116, secs. 1, 2, and 3, and 519, sec. 4),

respectively, and thereafter will be surveyed into town lots with appropriate reservations for public purposes, and will be appraised and sold from time to time in accordance with special regulations provided under section 2381, United States Revised Statutes, governing reclamation town sites.

133. *Survey and appraisal.*—Town sites under any law directing their disposition under section 2381 will be surveyed, when ordered by the department under the supervision of the General Land Office, into urban, or urban and suburban, lots and blocks, and thereafter the lots and blocks will be appraised by such disinterested person or persons as may be appointed by the Secretary of the Interior. Each appraiser must take his oath of office and transmit the same to the General Land Office before proceeding with his work. That office must be notified by wire of the time when such appraiser or appraisers enter on duty. They will examine each lot to be appraised and determine the fair and just cash value thereof. Improvements on such lots, if any, must not be considered in fixing such value. Lots or blocks reserved for public purposes will not be appraised.

134. The schedule of appraisement must be prepared in triplicate on forms furnished by the General Land Office, and the certificates at the end thereof must be signed by each appraiser, and on being so completed they must be immediately transmitted to said office, and when approved by the Secretary of the Interior one copy will be sent to the local land officers.

135. Notices of sale will be published for 30 days (unless a shorter time be fixed in a special case) by advertisement in such newspapers as the department may select and by posting a copy of the notice in a conspicuous place in the register's office.

136. *How sold.*—Beginning on the day fixed in the notice and continuing thereafter from day to day (Sundays and legal holidays excepted) as long as may be necessary, each appraised lot will be offered for sale at public outcry to the highest bidder for cash at not less than its appraised value.

137. *Qualifications and restrictions.*—No restriction is made as to the number of lots one person may purchase. Bids and payments may be made through agents, but not by mail or at any time or place other than that fixed in the notice of sale.

138. Combinations in restraint of the sale are forbidden by section 2373 of the Revised Statutes of the United States, which reads as follows:

Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees or attempts to bargain, contract, or agree with any other person that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management hinders or prevents or attempts to hinder or prevent any person from bidding upon or purchasing any tract of land so offered for sale shall be fined not more than one thousand dollars or imprisoned not more than two years, or both.

139. Suspension or postponement of the sale may be made for the time being to a further day, or indefinitely, in case of any combination which effectually suppresses competition or prevents the sale of any lot at its reasonable value, or in case of any disturbance which interrupts the orderly progress of the sale.

140. *Payments and forfeitures.*—If any bidder to whom a lot has been awarded fails to make the required payment therefor to the

receiver before the close of the office on the day the bid was accepted, the right thereafter to make such payment will be deemed forfeited, and the lot will be again offered for sale on the following day, or if the sale has been closed, then such lot will be considered as offered and unsold, and all bids thereafter by the defaulting bidder may, in the discretion of the local officers, be rejected.

141. *Lots offered and unsold.*—Each lot offered and remaining unsold at the close of the sale will thereafter be and remain subject to private sale and entry, for cash, at the appraised value of such lot.

142. *Certificates.*—All lots purchased at the same time, in the same manner, in the same town site, and by the same persons should be included in one certificate, in order to prevent unnecessary multiplicity of patents. Lots sold at private sale should be accompanied by an application therefor, signed by the applicant. Certificates will be issued upon payment of the purchase price, as in other cases.

143. In all cases where the Secretary of the Interior shall direct the reappraisement of unsold lots under the first section of the act of June 11, 1910 (36 Stat., 465), the reappraisement will be conducted under the regulations provided for under the original appraisal of lots in town sites created under the laws in said act mentioned. The lots to be reappraised will not, from the date of the order therefor, be subject to disposal until offered at public sale at the reappraised value, which offering will be conducted under the regulations providing for the public sale of lots in such town sites. The lots so offered at public sale will then become subject to private sale at the reappraised price.

144. Whenever the Secretary of the Interior, in the exercise of the discretion conferred upon him by section 2 of said act, shall order the payment of the purchase price of lots, sold in town sites created under the laws in said act mentioned, to be made in annual installments, the same will be done under such regulations as may be issued in each particular instance. Transfers of lots will not be recognized, but entries and patents must be issued in the name of original purchasers.

145. The Director of the Reclamation Service shall from time to time recommend to the Secretary of the Interior, through the Commissioner of the General Land Office, the withdrawal and reservation of such lands for town-site purposes, under the acts of April 16 and June 27, 1906 (34 Stat., 116 and 519), as he may deem advisable. He shall, when in his judgment the public interests require it, from time to time, cause not less than a legal subdivision, according to the official township surveys, of the lands so reserved to be surveyed into town lots, with appropriate reservations for public purposes. The plats and field notes of such surveys shall be prepared in triplicate for each town site, and shall be submitted for the approval of the Commissioner of the General Land Office, who, after such approval, shall submit the original plat for the approval of the Secretary of the Interior.

146. The said director shall from time to time recommend to the Secretary of the Interior the sale, the time and place of sale, the appraisal, the appraisers to be appointed, the officer to superintend the sale, and the compensation of the appraisers and

superintendent, and the newspapers for the publication of the notice of sale, of such portions of the surveyed lots as in his judgment the public interest may then require to be appraised and sold. The recommendations in this regulation above required shall be submitted through the Commissioner of the General Land Office for his concurrence or dissent. The Commissioner of the General Land Office shall prepare and submit to the Secretary of the Interior the details and appointments of the appraisers and the superintendent of sale in accordance with the approved recommendations, and when detailed or appointed he shall give them all necessary instructions; and he shall also prepare and transmit the notice of sale for publication. The report of the appraisers shall be transmitted to the Secretary of the Interior, through the Commissioner of the General Land Office, for action in accordance with the general regulations under section 2381, United States Revised Statutes.

147. The said director from time to time in like manner may cause one or more additional legal subdivisions of the lands so reserved for town-site purposes to be so surveyed into town lots, with appropriate reservations for public purposes; and he shall submit such further recommendations for appraisal and sale, in accordance with these regulations, as he may deem necessary or advisable; and he may in like manner submit recommendations for the reappraisal and sale of lots previously offered for sale and remaining unsold, as authorized by act of June 11, 1910 (36 Stat., 465).

APPEALS.

148. Appeal may be taken from the action of the project manager to the director, and ultimately to the Secretary of the Interior, as follows:

149. All cases of error or applications for relief should be promptly called to the attention of the project manager by the party affected. If the project manager decides to deny the request or application, he will serve upon the party aggrieved, personally or by registered mail, notice of his decision. The notice will state the facts, the reason for denying the relief asked, and also that the party aggrieved may appeal to the director within 30 days after receipt of the notice by filing with the project manager, addressed to the director, such appeal.

150. The appeal may consist of a written statement addressed to the director, setting out clearly and definitely the ground of complaint. The project manager will note thereon the date of its receipt in his office and promptly forward the same, with full report, to the director through the chief of construction, who will attach his recommendation.

151. Upon receipt of the papers in the director's office the matter will be reviewed and decision rendered, stating the reasons therefor and that appeal therefrom may be taken as in the next paragraph provided. Notice and copy of this decision will be served by the project manager upon the party aggrieved personally or by registered mail sent to the last-known address of such party.

152. The party aggrieved desiring to appeal from the director's decision will file with the project manager, within 60 days from

receipt of notice of director's decision, written statement of appeal, setting out the grounds thereof, addressed to the Secretary of the Interior. In case of appeal from the director's ruling, the matter will be submitted to the Secretary for consideration and appropriate action.

153. In case of service of notice of decision by registered mail, such notice will be mailed to the last known post-office address as shown in the record, and evidence of service will consist of the registry return card on which such letter was delivered, or, in case of inability of postal authorities to make delivery, of the returned unclaimed letter. When service is personal, the party making the service will make affidavit to that fact, stating time and place of service, or secure written acknowledgment of the person served, and file the same with the project manager.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Forwarded approved:

A. P. DAVIS,

Director and Chief Engineer.

Approved:

ANDRIEUS A. JONES,

First Assistant Secretary.

STATUTES.

GENERAL ACTS.

AN ACT Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act: *Provided,* That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the act of August thirtieth, eighteen hundred and ninety, entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.¹

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also, the cost of works in process of construction as well as of those which have been completed.

¹ Extended to the State of Texas by act of June 12, 1906. See p. 426.

SEC. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable, he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

SEC. 4.¹ That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also, of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5.² That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges appor-

¹ Sec. 4, number of installments, amended by act of Aug. 13, 1914. See p. 437.

² Sec. 5, manner of payments, amended by act of Aug. 9, 1912. See p. 435.

tioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

SEC. 7. That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior under this act to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

SEC. 9.¹ That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this act, so far as

¹ Sec. 9, repealed by act of June 25, 1910. See p. 430.

the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided*, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event within each ten-year period after the passage of this act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

Approved, June 17, 1902. (32 Stat., 388.)

AN ACT Authorizing the use of earth, stone, and timber on the public lands and forest reserves of the United States in the construction of works under the national irrigation law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in carrying out the provisions of the national irrigation law, approved June seventeenth, nineteen hundred and two, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under rules and regulations to be prescribed by him, such earth, stone, and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose, under rules and regulations to be prescribed by him.

Approved, February 8, 1905. (33 Stat., 706.)

AN ACT To provide for the covering into the reclamation fund certain proceeds of sales of property purchased by the reclamation fund.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be covered into the reclamation fund established under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, the proceeds of the sales of material utilized for temporary work and structures in connection with the operations under the said act, as well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said reclamation act.

Approved, March 3, 1905. (33 Stat., 1032.)

AN ACT Providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may withdraw from public entry any lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes.

SEC. 2. That the lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the necessary expenses of appraisal and sale, and the proceeds of such sales shall be covered into the reclamation fund.

SEC. 3. That the public reservations in such town sites shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they shall be used forever for public purposes.

SEC. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.

SEC. 5.¹ That whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project.

Approved, April 16, 1906. (34 Stat., 116.)

¹ Sec. 5, amended by act of Feb. 24, 1911. See p. 433.

AN ACT To extend the irrigation act to the State of Texas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, be, and the same are hereby, extended so as to include and apply to the State of Texas.

Approved, June 12, 1906. (34 Stat., 259.)

AN ACT Providing for the subdivision of lands entered under the reclamation act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, in the opinion of the Secretary of the Interior, by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the reclamation act, he may fix a lesser area than forty acres as the minimum entry, and may establish farm units of not less than ten nor more than one hundred and sixty acres. That wherever it may be necessary, for the purpose of accurate description, to further subdivide lands to be irrigated under the provisions of said reclamation act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the reclamation service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivision surveys shall be noted upon the tract books in the General Land Office, and they shall be paid for from the reclamation fund: *Provided,* That an entryman may elect to enter under said reclamation act a lesser area than the minimum limit in any State or Territory.

SEC. 2. That wherever the Secretary of the Interior, in carrying out the provisions of the reclamation act, shall acquire by relinquishment lands covered by a bona fide unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made.

SEC. 3. That any town site heretofore set apart or established by proclamation of the President, under the provisions of sections twenty-three hundred and eighty and twenty-three hundred and eighty-one of the Revised Statutes of the United States, within or in the vicinity of any reclamation project, may be appraised and disposed of in accordance with the provisions of the act of Congress approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed

for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes"; and all necessary expenses incurred in the appraisal and sale of lands embraced within any such town site shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

Sec. 4. * * * and whenever, in the opinion of the Secretary of the Interior, it shall be advisable for the public interest, he may withdraw and dispose of town sites in excess of one hundred and sixty acres under the provisions of the aforesaid act approved April sixteenth, nineteen hundred and six, and reclamation funds shall be available for the payment of all expenses incurred in executing the provisions of this act, and the aforesaid act of April sixteenth, nineteen hundred and six, and the proceeds of all sales of town sites shall be covered into the reclamation fund.

Sec. 5. That where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Approved, June 27, 1906. (34 Stat., 519.)

AN ACT Providing for the reappraisal of unsold lots in town sites on reclamation projects, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within town sites on projects under the reclamation act heretofore or hereafter appraised under the provisions of the act approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," and the act approved June twenty-seventh, nineteen hundred and six, entitled "An act providing for the subdivision of lands entered under the reclamation act, and for other purposes"; and thereafter to proceed with the sale of such town lots in accordance with said acts.

SEC. 2. That in the sale of town lots under the provisions of the said acts of April sixteenth and June twenty-seventh, nineteen hundred and six, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of six per centum per annum on deferred payments.

Approved, June 11, 1910. (36 Stat., 465.)

AN ACT Providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years the same as though said entry had been made under original homestead act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.¹

Approved, June 23, 1910. (36 Stat., 592.)

AN ACT To authorize advances to the "reclamation fund," and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the Secretary of the Interior to complete Government reclamation

¹ Extended to Flathead project by the act of July 17, 1914 (38 Stat., 510). See p. 445.

projects heretofore begun, the Secretary of the Treasury is authorized, upon request of the Secretary of the Interior, to transfer from time to time to the credit of the reclamation fund created by the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, such sum or sums, not exceeding in the aggregate twenty million dollars, as the Secretary of the Interior may deem necessary to complete the said reclamation projects, and such extensions thereof as he may deem proper and necessary to the successful and profitable operation and maintenance thereof or to protect water rights pertaining thereto claimed by the United States, provided the same shall be approved by the President of the United States; and such sum or sums as may be required to comply with the foregoing authority are hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided*, That the sums hereby authorized to be transferred to the reclamation fund shall be so transferred only as such sums shall be actually needed to meet payments for work performed under existing law: *And provided further*, That all sums so transferred shall be reimbursed to the Treasury from the reclamation fund, as hereinafter provided: *And provided further*, That no part of this appropriation shall be expended upon any existing project until it shall have been examined and reported upon by a board of engineer officers of the Army, designated by the President of the United States, and until it shall be approved by the President as feasible and practicable and worthy of such expenditure; nor shall any portion of this appropriation be expended upon any new project.

SEC. 2. That for the purpose of providing the Treasury with funds for such advances to the reclamation fund, the Secretary of the Treasury is authorized to issue certificates of indebtedness of the United States in such form as he may prescribe and in denominations of fifty dollars, or multiples of that sum; said certificates to be redeemable at the option of the United States at any time after three years from the date of their issue and to be payable five years after such date, and to bear interest, payable semiannually, at not exceeding three per centum per annum; the principal and interest to be payable in gold coin of the United States. The certificates of indebtedness herein authorized may be disposed of by the Secretary of the Treasury at not less than par, under such rules and regulations as he may prescribe, giving all citizens of the United States an equal opportunity to subscribe therefor, but no commission shall be allowed and the aggregate issue of such certificates shall not exceed the amount of all advances made to said reclamation fund, and in no event shall the same exceed the sum of twenty million dollars. The certificates of indebtedness herein authorized shall be exempt from taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority; and a sum not exceeding one-tenth of one per centum of the amount of the certificates of indebtedness issued under this act is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expense of preparing, advertising, and issuing the same.

SEC. 3. That beginning five years after the date of the first advance to the reclamation fund under this act, fifty per centum of the annual receipts of the reclamation fund shall be paid into the general fund of the Treasury of the United States until payments so made shall equal the aggregate amount of advances made by the Treasury to said reclamation fund, together with interest paid on the certificates of indebtedness issued under this act and any expense incident to preparing, advertising, and issuing the same.

SEC. 4. That all money placed to the credit of the reclamation fund in pursuance to this act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included with all other expenses in future estimates of construction, operation, or maintenance, and hereafter no irrigation project contemplated by said act of June seventeenth, nineteen hundred and two, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States.

SEC. 5.¹ That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same.

SEC. 6. That section nine of said act of Congress, approved June seventeenth, nineteen hundred and two, entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," is hereby repealed.

Approved June 25, 1910. (36 Stat., 835.)

AN ACT Granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all qualified entrymen who have heretofore made bona fide entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the national irrigation act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided*, That the period of actual absence under this act shall not be deducted from the full time of residence required by law.

Approved June 25, 1910. (36 Stat., 864.)

¹ Sec. 5, amended by act of Feb. 18, 1911, see p. 431; and sec. 10 of the act of Aug. 13, 1914, see p. 440.

AN ACT To provide for the sale of lands acquired under the provisions of the reclamation act and which are not needed for the purposes of that act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), commonly called the "reclamation act," or under the provisions of any act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said reclamation act are not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land.

SEC. 2. That upon payment of the purchase price the Secretary of the Interior is authorized by appropriate deed to convey all the right, title, and interest of the United States of, in, and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secretary may deem proper: *Provided*, That not over one hundred and sixty acres shall be sold to any one person.

SEC. 3. That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired.

Approved, February 2, 1911. (36 Stat., 895.)

AN ACT To authorize the Secretary of the Interior to withdraw public notices issued under section four of the reclamation act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may, in his discretion, withdraw any public notice heretofore issued under section four of the reclamation act of June seventeenth, nineteen hundred and two, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users' associations and others, entered into prior to the passage of this act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts and proceed in all respects as if no such notice had been given.

Approved, February 13, 1911. (36 Stat., 902.)

AN ACT To amend section five of the act of Congress of June twenty-fifth, nineteen hundred and ten, entitled "An act to authorize advances to the 'reclamation fund' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes."¹

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section five

¹ Amended by sec. 10, act of Aug. 13, 1914. See p. 440.

of an act entitled "An act to authorize advances to the 'reclamation fund' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes," approved June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and thirty-five), be, and the same hereby is, amended as follows:

"SEC. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied, and make public announcement of the same: *Provided*, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished in whole or in part the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an act entitled 'An act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight)."

Approved, February 18, 1911. (36 Stat., 917.)

AN ACT To authorize the Government to contract for impounding, storing, and carriage of water and to cooperate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever in carrying out the provisions of the reclamation law storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however*, That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for

the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

SEC. 2. That in carrying out the provisions of said reclamation act and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users' associations, corporations, entrymen, or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users' associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes: *Provided*, That the title to and management of the works so constructed shall be subject to the provisions of section six of said act: *Provided further*, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided*, That nothing contained in this act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

SEC. 3. That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the reclamation act and the acts amendatory thereof or supplementary thereto.

Approved, February 21, 1911. (36 Stat., 925.)

AN ACT To amend an act entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," approved April sixteenth, nineteen hundred and six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section five of an act entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," approved April sixteenth, nineteen hundred and six, be amended so as to read as follows:

"SEC. 5. That whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period of not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: *Provided further*, That the

Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period, not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of section six of the reclamation act approved June seventeenth, nineteen hundred and two."

Approved, February 24, 1911. (36 Stat., 930.)

AN ACT For the relief of homestead entrymen under the reclamation projects in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That no qualified entryman who prior to June twenty-fifth, nineteen hundred and ten, made bona fide entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, the national reclamation law, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time when water is available for the irrigation of the lands embraced in his entry, but all such entrymen shall, within ninety days after the issuance of the public notice required by section four of the reclamation act, fixing the date when water will be available for irrigation, file in the local land office a water-right application for the irrigable lands embraced in his entry, in conformity with the public notice and approved farm-unit plat for the township in which his entry lies, and shall also file an affidavit that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make final proof: *Provided*, That no such entryman shall be entitled to have counted as part of the required period of residence any period of time during which he was not actually upon the said land prior to the date of the notice aforesaid, and no application for the entry of said lands shall be received until after the expiration of the ninety days after the issuance of notice within which the entryman is hereby required to reestablish his residence and apply for water right.

Approved, April 30, 1912. (37 Stat., 105.)

AN ACT Relating to partial assignments for desert-land entries within reclamation projects made since March twenty-eighth, nineteen hundred and eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a desert-land entry within the exterior limits of a Government reclamation project may be assigned in whole or in part under the act of March twenty-eighth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page fifty-two), and the benefits and limitations of the act of June

twenty-seventh, nineteen hundred and six (Thirty-fourth Statutes at Large, page five hundred and twenty), shall apply to such desert-land entryman and his assignees: *Provided*, That all such assignments shall conform to and be in accordance with farm units to be established by the Secretary of the Interior upon the application of the desert-land entryman. All such assignments heretofore made in good faith shall be recognized under this act.

Approved July 24, 1912. (37 Stat., 200.)

AN ACT Providing for patents on reclamation entries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any homestead entryman under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation, and cultivation submit proof of such residence, reclamation, and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation act for homestead entrymen: *Provided*, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid.¹

SEC. 2. That every patent and water-right certificate issued under this act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and costs. The balance of the proceeds, if any, shall be the property of the defaulting debtor or his assignee: *Provided*, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs.

¹ Extended to desert-land entries by act of Aug. 26, 1912 (37 Stat., 610). See p. 436.

SEC. 3. That upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintenance: *Provided*, That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation act of June seventeenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this act.

SEC. 4. That the Secretary of the Interior is hereby authorized to designate such bonded fiscal agents or officers of the Reclamation Service as he may deem advisable on each reclamation project, to whom shall be paid all sums due on reclamation entries or water rights, and the officials so designated shall keep a record for the information of the public of the sums paid and the amount due at any time on account of any entry made or water right purchased under the reclamation act, and the Secretary of the Interior shall make provision for furnishing copies of duly authenticated records of entries upon payment of reasonable fees, which copies shall be admissible in evidence, as are copies authenticated under section eight hundred and eighty-eight of the Revised Statutes.

SEC. 5. That jurisdiction of suits by the United States for the enforcement of the provisions of this act is hereby conferred on the United States district courts of the districts in which the lands are situated.

Approved August 9, 1912. (37 Stat., 265.)

AN ACT Making appropriations to supply deficiencies in appropriations for the fiscal year nineteen hundred and twelve and for prior years, and for other purposes.

* * * * *

That any desert-land entryman whose desert-land entry has been embraced within the exterior limits of any land withdrawal or irrigation project under the act of June seventeenth, nineteen hundred

and two, known as the reclamation act, and who may have obtained a water supply for the land embraced in any such desert-land entry from the reclamation project by the purchase of a water-right certificate, may at any time after having complied with the provisions of the law applicable to such lands, and upon proof of the cultivation and reclamation of the land to the extent required by the reclamation act for homestead entrymen, submit proof of such compliance, which proof, if found regular and satisfactory, shall entitle the entryman to a patent and a final water-right certificate under the same terms and conditions as required of homestead entrymen under the act entitled "An act providing for patents on reclamation entries, and for other purposes," approved August ninth, nineteen hundred and twelve.

* * * * *

Approved August 26, 1912. (37 Stat., 610.)

AN ACT Extending the period of payment under reclamation projects, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person whose lands hereafter become subject to the terms and conditions of the act approved June seventeenth, nineteen hundred and two, entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and acts amendatory thereof or supplementary thereto, hereafter to be referred to as the reclamation law, and any person who hereafter makes entry thereunder shall at the time of making water-right application or entry, as the case may be, pay into the reclamation fund five per centum of the construction charge fixed for his land as an initial installment, and shall pay the balance of said charge in fifteen annual installments, the first five of which shall each be five per centum of the construction charge and the remainder shall each be seven per centum until the whole amount shall have been paid. The first of the annual installments shall become due and payable on December first of the fifth calendar year after the initial installment: *Provided*, That any water-right applicant or entryman may, if he so elects, pay the whole or any part of the construction charges owing by him within any shorter period: *Provided further*, That entry may be made whenever water is available, as announced by the Secretary of the Interior, and the initial payment be made when the charge per acre is established.

SEC. 2. That any person whose land or entry has heretofore become subject to the terms and conditions of the reclamation law shall pay the construction charge, or the portion of the construction charge remaining unpaid, in twenty annual installments, the first of which shall become due and payable on December first of the year in which the public notice affecting his land is issued under this act, and subsequent installments on December first of each year thereafter. The first four of such installments shall each be two per centum, the next two installments shall each be four per centum, and the next fourteen

each six per centum of the total construction charge, or the portion of the construction charge unpaid at the beginning of such installments.

SEC. 3. That if any water-right applicant or entryman shall fail to pay any installment of his construction charges when due, there shall be added to the amount unpaid a penalty of one per centum thereof, and there shall be added a like penalty of one per centum of the amount unpaid on the first day of each month thereafter so long as such default shall continue. If any such applicant or entryman shall be one year in default in the payment of any installment of the construction charges and penalties, or any part thereof, his water-right application, and if he be a homestead entryman his entry also, shall be subject to cancellation, and all payments made by him forfeited to the reclamation fund, but no homestead entry shall be subject to contest because of such default: *Provided*, That if the Secretary of the Interior shall so elect, he may cause suit or action to be brought for the recovery of the amount in default and penalties; but if suit or action be brought, the right to declare a cancellation and forfeiture shall be suspended pending such suit or action.

SEC. 4. That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges: *Provided*, That the Secretary of the Interior, in his discretion, may agree that such increased construction charge shall be paid in additional annual installments, each of which shall be at least equal to the amount of the largest installment as fixed for the project by the public notice theretofore issued. And such additional installments of the increased construction charge, as so agreed upon, shall become due and payable on December first of each year subsequent to the year when the final installment of the construction charge under such public notice is due and payable: *Provided further*, That all such increased construction charges shall be subject to the same conditions, penalties, and suit or action as provided in section three of this act.

SEC. 5. That in addition to the construction charge, every water-right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered; but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water: *Provided*, That whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and

regulations as he may prescribe. If the total amount of operation and maintenance charges and penalties collected for any one irrigation season on any project shall exceed the cost of operation and maintenance of the project during that irrigation season, the balance shall be applied to a reduction of the charge on the project for the next irrigation season, and any deficit incurred may likewise be added to the charge for the next irrigation season.

SEC. 6. That all operation and maintenance charges shall become due and payable on the date fixed for each project by the Secretary of the Interior, and if such charge is paid on or before the date when due there shall be a discount of five per centum of such charge; but if such charge is unpaid on the first day of the third calendar month thereafter, a penalty of one per centum of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per centum of the amount unpaid shall be added on the first day of each calendar month if such charge and penalties shall remain unpaid, and no water shall be delivered to the lands of any water-right applicant or entryman who shall be in arrears for more than one calendar year for the payment of any charge for operation and maintenance or any annual construction charge and penalties. If any water-right applicant or entryman shall be one year in arrears in the payment of any charge for operation and maintenance and penalties, or any part thereof, his water-right application, and if he be a homestead entryman his entry also, shall be subject to cancellation, and all payments made by him forfeited to the reclamation fund, but no homestead entry shall be subject to contest because of such arrears. In the discretion of the Secretary of the Interior suit or action may be brought for the amounts in default and penalties in like manner as provided in section three of this act.

SEC. 7. That the Secretary of the Interior is hereby authorized, in his discretion, to designate and appoint, under such rules and regulations as he may prescribe, the legally organized water users' association or irrigation district, under any reclamation project, as the fiscal agent of the United States to collect the annual payments on the construction charge of the project and the annual charges for operation and maintenance and all penalties: *Provided*, That no water-right applicant or entryman shall be entitled to credit for any payment thus made until the same shall have been paid over to an officer designated by the Secretary of the Interior to receive the same.

SEC. 8. That the Secretary of the Interior is hereby authorized to make general rules and regulations governing the use of water in the irrigation of the lands within any project, and may require the reclamation for agricultural purposes and the cultivation of one-fourth the irrigable area under each water-right application or entry within three full irrigation seasons after the filing of water-right application or entry, and the reclamation for agricultural purposes and the cultivation of one-half the irrigable area within five full irrigation seasons after the filing of the water-right application or entry, and shall provide for continued compliance with such requirements. Failure on the part of any water-right applicant or entryman to comply with such requirements shall render his application or entry subject to cancellation.

SEC. 9. That in all cases where application for water right for lands in private ownership or lands held under entries not subject to the reclamation law shall not be made within one year after the passage of this act, or within one year after notice issued in pursuance of section four of the reclamation act, in cases where such notice has not heretofore been issued, the construction charges for such land shall be increased five per centum each year until such application is made and an initial installment is paid.

SEC. 10. That the act of Congress approved February eighteenth, nineteen hundred and eleven, entitled "An act to amend section five of the act of Congress of June twenty-fifth, nineteen hundred and ten, entitled 'An act to authorize advances to the reclamation fund and for the issuance and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes,'" be, and the same hereby is, amended so as to read as follows:

"SEC. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior: *Provided*, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished, in whole or in part, the lands so relinquished shall be subject to settlement and entry under the reclamation law."

SEC. 11. That whenever water is available and it is impracticable to apportion operation and maintenance charges as provided in section five of this act, the Secretary of the Interior may, prior to giving public notice of the construction charge per acre upon land under any project, furnish water to any entryman or private landowner thereunder until such notice is given, making a reasonable charge therefor, and such charges shall be subject to the same penalties and to the provisions for cancellation and collection as herein provided for other operation and maintenance charges.

SEC. 12. That before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the projects if adopted for construction.

SEC. 13. That all entries under reclamation projects containing more than one farm unit shall be reduced in area and conformed to a single farm unit within two years after making proof of residence, improvement, and cultivation, or within two years after the issuance of a farm-unit plat for the project, if the same issues subsequent to the making of such proof: *Provided*, That such proof is made within four years from the date as announced by the Secretary of the Interior that water is available for delivery for the land. Any entryman failing within the period herein provided to dispose of the excess of his entry above one farm unit, in the manner provided by

law, and to conform his entry to a single farm unit shall render his entry subject to cancellation as to the excess above one farm unit: *Provided*, That upon compliance with the provisions of law such entryman shall be entitled to receive a patent for that part of his entry which conforms to one farm unit as established for the project: *Provided further*, That no person shall hold by assignment more than one farm unit prior to final payment of all charges for all the land held by him subject to the reclamation law, except operation and maintenance charges not then due.

SEC. 14. That any person whose land or entry has heretofore become subject to the reclamation law, who desires to secure the benefits of the extension of the period of payments provided by this act, shall, within six months after the issuance of the first public notice hereunder affecting his land or entry, notify the Secretary of the Interior, in the manner to be prescribed by said Secretary, of his acceptance of all of the terms and conditions of this act, and thereafter his lands or entry shall be subject to all of the provisions of this act.

SEC. 15. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

SEC. 16. That from and after July first, nineteen hundred and fifteen, expenditures shall not be made for carrying out the purposes of the reclamation law except out of appropriations made annually by Congress therefor, and the Secretary of the Interior shall, for the fiscal year nineteen hundred and sixteen, and annually thereafter, in the regular Book of Estimates, submit to Congress estimates of the amount of money necessary to be expended for carrying out any or all of the purposes authorized by the reclamation law, including the extension and completion of existing projects and units thereof and the construction of new projects. The annual appropriations made hereunder by Congress for such purposes shall be paid out of the reclamation fund provided for by the reclamation law.

Approved, August 13, 1914. (38 Stat., 686.)

AN ACT To authorize the reservation of public lands for country parks and community centers within reclamation projects, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to withdraw from other disposition and reserve for country parks, public playgrounds, and community centers for the use of the residents upon the lands such tracts as he may deem advisable not exceeding twenty acres in any one township in each reclamation project or the several units of such reclamation projects undertaken under the act of June seventeenth, nineteen hundred and two, known as the reclamation act.

SEC. 2. That subject to the provisions hereinafter contained every such tract of land so set apart shall be supplied with water from the

Government irrigation system, the cost thereof to be charged to the remaining lands of the project as a part of the construction charge of such project, and shall be maintained and used in perpetuity by the people upon said reclaimed lands for a pleasure park, public playground, and community center.

SEC. 3. That for the purpose of carrying out and effecting the objects of this act the Secretary of the Interior is authorized to enter into a contract with the organization formed by the owners of the lands irrigated within said project or project unit pursuant to section six of the act of June seventeenth, nineteen hundred and two, stipulating and providing that the organization will maintain and use such of the lands so reserved for the purposes prescribed in this act as such organization may desire, and that upon failure to so maintain and use such lands, or in the event that same shall be permitted to be used or occupied for other purposes than those stipulated in this act, the control of the lands shall revert to the United States.

SEC. 4. That any of such lands not contracted for in accordance with the provisions of section three of this act within ten years from the time water is available for the same, or sooner, if the Secretary of the Interior may deem it desirable, shall be disposed of in accordance with the public-land laws applicable thereto, and the proceeds from the disposition of lands reverting to the United States under the provisions of this act, and from sales of water rights, shall be covered into the reclamation fund and placed to the credit of the project wherein the lands are situate.

Approved, October 5, 1914. (38 Stat., 727.)

AN ACT For the relief of homestead entrymen under the reclamation projects of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has made homestead entry under the act of June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight), for land believed to be susceptible of irrigation which at the time of said entry was withdrawn for any contemplated irrigation project, may relinquish the same provided that it has since been determined that the land embraced in such entry or all thereof in excess of twenty acres is not or will not be irrigable under the project, and in lieu thereof may select and make entry for any farm unit included within such irrigation project as finally established, notwithstanding the provisions of section five of the act of June twenty-fifth, nineteen hundred and ten, entitled "An Act to authorize advances to the reclamation fund," and so forth, and acts amendatory thereof: *Provided,* That such entrymen shall be given credit on the new entry for the time of bona fide residence maintained on the original entry.

Approved, March 4, 1915. (38 Stat., 1215.)

AN ACT To amend the act of June twenty-third, nineteen hundred and ten, entitled "An act providing that entrymen for homesteads within the reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead act."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of June twenty-third, nineteen hundred and ten (Public, Two hundred and forty-three, Thirty-sixth Statutes, page five hundred and ninety-two), entitled "An act providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead act," is hereby amended by adding the following proviso:

"*Provided,* That in the absence of any intervening valid adverse interests any assignment made between June twenty-third, nineteen hundred and ten, and January first, nineteen hundred and thirteen, of land upon which the assignor has submitted satisfactory final proof and the assignee purchased with the belief that the assignment was valid and under the act of June twenty-third, nineteen hundred and ten, is hereby confirmed, and the assignee shall be entitled to the land assigned as under the act of June twenty-third, nineteen hundred and ten, notwithstanding that said original entry was conformed to farm units and that the part assigned was canceled and eliminated from said entry prior to the date of final proof: *Provided further,* That all entries so assigned shall be subject to the limitations, terms and conditions of the reclamation act and acts amendatory thereof or supplemental thereto, and all of said assignees whose entries are hereby confirmed shall, as a condition to receiving patent, make the proof heretofore required of assignees."

Approved, May 8, 1916. (Public No. 72, 64th Cong.)

AN ACT To amend section fourteen of the reclamation extension act approved August thirteenth, nineteen hundred and fourteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fourteen of an act entitled "An act extending the period of payment under reclamation projects, and for other purposes," approved August thirteenth, nineteen hundred and fourteen, be amended so as to read as follows:

"SEC. 14. That any person whose land or entry has heretofore become subject to the reclamation law, who desires to secure the benefits of the extension of the period of payments provided by this act, shall, within six months after the issuance of the first public notice hereunder affecting his land or entry, notify the Secretary of the Interior, in the manner to be prescribed by said Secretary, of his acceptance of all the terms and conditions of this act, and thereafter his lands or entry shall be subject to all of the provisions of this act: *Provided,* That upon sufficient showing the Secretary of the Interior may, in his discretion, permit notice of acceptance of all the terms and conditions of this act to be filed at any time after the time limit hereinbefore fixed for filing such acceptance shall have expired,

conditioned, however, that where the applicant for such acceptance is in arrears on construction charges, he shall at the time of acceptance pay such installments of the construction charge as he would have been required to pay had he accepted this act within the time limit hereinabove fixed, plus the penalties that would have accrued had he so accepted, and such applicant shall thereafter be upon the same status that he would have been had he accepted the provisions of this act within the time limit hereinabove fixed, and thereafter the lands or entry of any such persons so filing such notice of acceptance shall be subject to all the provisions of this act."

Approved, July 26, 1916. (Public No. 167, 64th Cong.)

SPECIAL ACTS.

The act of April 23, 1904 (33 Stat., 302), as amended by section 15 of the act of May 29, 1908 (35 Stat., 448), provides for the disposition and irrigation of lands within the limits of the Flathead Indian Reservation, Mont.

Section 25 of the act approved April 21, 1904 (33 Stat., 224), provides for the reclamation, allotment, and disposal of surplus irrigable lands in the Yuma and Colorado River Indian Reservations in California and Arizona.

Section 26 of the act of April 21, 1904, *supra*, provides for the reclamation, allotment, and disposal of surplus irrigable lands in the Pyramid Lake Indian Reservation, Nev.

The act of April 27, 1904 (33 Stat., 352), authorizes the reclamation and disposition of irrigable lands in the ceded Crow Indian Reservation in Montana.

Section 12 of the act of March 22, 1906 (34 Stat., 82), provides for the disposition, under the reclamation act, of lands in the diminished Colville Indian Reservation, Wash.

The act of June 9, 1906 (34 Stat., 228), authorizes the disposition of lands in the abandoned Fort Shaw Military Reservation, Mont., under the reclamation act.

The act of March 6, 1906 (34 Stat., 53), authorizes the reclamation and disposal of surplus irrigable lands in the Yakima Indian Reservation, Wash.

The act of June 21, 1906 (34 Stat., 327), authorizes the sale of allotted Indian lands on reclamation projects and the act of March 3, 1909 (35 Stat., 782), authorizes the Secretary of the Interior to make allotments of such lands in such areas as he may deem proper, not exceeding the amount therein named.

The act of March 1, 1907 (34 Stat., 1037), provides for the disposition of irrigable lands in the Blackfeet Indian Reservation, Mont.

The act of April 30, 1908 (35 Stat., 85), provides for the irrigation of Indian lands.

Sections 1 and 10 of the act of Congress approved May 30, 1908 (35 Stat., 558), provide for the reclamation of lands on the Fort Peck Indian Reservation, Mont.

Paragraph 5, section 10, act of June 20, 1910 (36 Stat., 564), provides for the disposition of school lands in reclamation projects in the State of New Mexico.

Paragraph 5, section 28, act of June 20, 1910 (36 Stat., 574), provides for the disposition of school lands in reclamation projects in the State of Arizona.

Section 1 of the act of June 22, 1910 (36 Stat., 583), authorizes the withdrawal and reclamation of classified coal land, patents for such lands to reserve to the United States the coal deposits therein.

The act of September 30, 1913 (38 Stat., 113), authorizes the President, whenever in his judgment it is proper or necessary, to provide for the opening of lands withdrawn from entry, by settlement in advance of entry, by drawing, or by such other method as he may deem advisable in the interest of equal opportunity and good administration. Section 2 of said act provides that where the Secretary of the Interior is authorized to make restoration of lands previously withdrawn he may also restrict the restoration as provided in section 1.

The act of July 17, 1914 (38 Stat., 510), extends to the Flathead irrigation project, Montana, the provisions of the act of June 23, 1910 (36 Stat., 592), authorizing assignments of reclamation homestead entries, and the provisions of the act of August 9, 1912 (37 Stat., 265), providing for the issuance of final certificates and patents upon reclamation homestead entries upon the submission of proof of reclamation and of the payment of all the charges, including the water-right charges due in connection therewith to the date of such final certificates and patents.

The act of September 5, 1914 (38 Stat., 712), authorizes second homestead or desert-land entries where former entries are lost, forfeited, or abandoned, through no fault of the entryman.

MOODY v. MYERS.

Decided May 31, 1916.

CONTEST—CHARGE—CONSTRUCTION.

An affidavit of contest will be construed more strictly where the sufficiency of the charge is put in issue prior to allowance of the contest than in a case where contest has been allowed and gone to hearing and the proof satisfies the charge, whether construed liberally or technically, and warrants cancellation of the entry.

CONTEST—CHARGE—WIDOW, HEIRS, DEVISEE.

A contest against the entry of a deceased homestead entryman on the ground that he left no statutory successor should allege that he left no widow, heir, or devisee, and not merely that he "left no heirs."

CONTEST—CHARGE—AMENDMENT.

An affidavit of contest charging that the deceased entryman "left no heirs" may be amended, notwithstanding an intervening junior contest, to aver that entryman left no widow, heir, or devisee.

JONES, *First Assistant Secretary:*

Virgil C. Moody has appealed from decision of February 2, 1916, by the Commissioner of the General Land Office, dismissing his contest against the homestead entry of James J. Myers because of insufficient charge.

It appears that Myers made homestead entry on November 4, 1914, for lot 3, Sec. 14, T. 56 N., R. 1 E., Coeur d'Alene, Idaho, land district, filing therewith his affidavit alleging establishment of residence on the land July 12, 1909. At that time he alleged that he had improvements on the land to the total value of \$1,000 and that he had continuously resided thereon since the said date of settlement.

January 3, 1916, Moody filed contest affidavit against the entry, alleging:

that said entryman, James J. Myers, died on December 31, 1915, and at the time of his death left no heirs at law surviving him or no heir at law and for that reason the entry lapsed at his death and the land is now unoccupied, unappropriated public land of the United States subject to homestead entry.

It further appears that on January 6, 1916, Jose H. Shavelear filed a contest affidavit against said entry alleging that Myers, previous to the year 1912, contracted for the sale of one-half interest in the land after he should receive patent from the Government.

Shavelear also has written to the Land Office stating that the affidavit of Moody is false, alleging that no heirs survive the entryman, but this is a matter for proof should the case go to a hearing upon a sufficient charge. The question for decision is whether the allegation of Moody is sufficient upon which to order a hearing. The Commissioner held the charge insufficient, inasmuch as it did not allege invalidity of the entry or failure of compliance with law and

did not state that the entryman left no devisee. In opposition to this criticism of the affidavit Moody contends by the use of the word heir the affidavit was sufficient to include any other statutory successor such as devisee.

The homestead law provides that in case of the death of an entryman final proof may be submitted by his widow, if there be one, or in case of her death, or if there be no widow, by his heirs or devisee.

The term heir does not in the strict sense include devisee. It is true that in some cases, especially where a hearing had taken place upon an allegation of nonexistence of heirs to claim the homestead entry and where the evidence showed that there were neither heirs nor devisees, the Department has held the charge sufficient. But there is a possibility that the charge as here made, when construed most strictly, might be proven and yet not make a case for cancellation of the entry. The statute itself uses both terms, heirs and devisee, as statutory successors. A distinction is made in law between these terms. The land officials are vested with a degree of discretionary power with reference to allowance of contests. A stricter construction is justified as a matter of precaution prior to allowance of a contest, than would be justified where a contest has been allowed and gone to a hearing and where the proof satisfies the charge, whether construed liberally or technically. In other words, a strict construction of the charge is justified in the first instance, while a liberal construction should be applied after a hearing and where the proof shows proper grounds for cancellation.

In this case it is believed that Moody's affidavit is sufficient to give him priority in the right of contest upon the charge of failure of statutory successors, but in order to make his charge more definite and certain, he should be required to amplify his charge so as to clearly and definitely aver that there is no surviving widow, heir, or devisee. Should he decline or fail to file such amendatory affidavit his application to contest will be dismissed. He will not be permitted to amend his affidavit so as to include a strictly new charge, except as junior to the contest of Shavelear, the privilege here afforded being merely for amendment to make more specific and clear the probable intention of the former allegation.

The decision appealed from is modified accordingly.

MOODY v. MYERS.

Motion for rehearing of departmental decision of May 31, 1916, 45 L. D., 446, denied by Assistant Secretary Sweeney September 27, 1916.

JOHN A. JONES.

Decided June 3, 1916.

NATIONAL FOREST—EXCEPTED LANDS.

Lands which at the date of the proclamation creating a national forest are covered by a patent are excepted from the force and effect of the proclamation; but in event of reconveyance by the patentee, after recommendation for the institution of suit to cancel the patent on the ground of noncompliance with law prior to its issue, the lands at once become part of the national forest.

JONES, First Assistant Secretary:

John A. Jones appealed from decision of February 4, 1916, rejecting his timber and stone application for Lots 1, 6, 7 NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, T. 26 N., R. 2 W., W. M., on the ground that the land is reserved for forestry purposes. The history of this tract is that June 26, 1905, Wilfred N. Leise made homestead entry for this land on which he submitted commutation proof November 30, 1906, on which patent issued July 31, 1907, but on report of a special agent the case was referred to the Attorney General with recommendation that suit be brought to cancel the patent for noncompliance with the homestead law prior to its issue. Before action was brought Leise reconveyed to the United States, which deed was recorded and accepted by the Commissioner, after which Jones filed his application October 18, 1915.

While title was out of the United States the land was included, March 2, 1907, by Executive proclamation, within the Olympic forest reserve. This proclamation contained an excepting clause of all land embraced in any legal entry or governed by any lawful filing or selection of record in the proper land office or upon which any valid settlement had been made pursuant to law, provided that these exceptions shall not continue to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made.

The appeal insists that the settlement and infirm title granted thereon by the land department excepted the land permanently from the forest reserve, citing decisions to the effect that a right to patent for land once vested is treated by the Government, when dealing with the public land, as equivalent to a patent issued. The land department has no quarrel with these decisions and does not question the doctrines so declared, but the exception of these lands from the reserve was conditional on a continued compliance with the law. In other words the withdrawal for public use was complete, saving to settlers and others having valid claims a right to perfect their claims. Leise's reconveyance to the United States rather than bear the expense of a suit was a confession that he did not comply with the

law. On cancellation of his right, therefore, the land fell into the forest reserve and not into the public domain. John E. Henry (30 L. D., 158.)

The decision is affirmed.

ESTHER C. ROSE.¹

Decided July 6, 1916.

ENLARGED HOMESTEAD—SEC. 6, ACT JUNE 17, 1910—CULTIVATION.

The three-year homestead act of June 6, 1912, does not have the effect to reduce to three years the five-year period of cultivation required upon enlarged homestead entries under section 6 of the act of June 17, 1910.

CREDIT FOR MILITARY SERVICE UNDER SECTION 2305, R. S.

Credit for military service can not be allowed, under section 2305, R. S., to reduce the required period of cultivation upon an enlarged homestead entry under section 6 of the act of June 17, 1910. [See modification, pages 324 and 451.]

CULTIVATION BY ENTRYWOMAN.

An entrywoman under section 6 of the act of June 17, 1910, is not required to personally perform the physical labor of preparing the soil and cultivating and harvesting the crops, but it will be deemed a compliance with the requirements of the law if such work be done under her personal supervision.

JONES, *First Assistant Secretary*:

Esther C. Rose has appealed from decision of March 23, 1916, by the Commissioner of the General Land Office, rejecting her final proof submitted on enlarged homestead entry for lots 1 and 2 and the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 6, T. 1 N., R. 4 E., B. M., Boise, Idaho, land district.

The entry was made September 19, 1912, as an ordinary homestead entry under section 2289, Revised Statutes. The entrywoman applied to have the entry changed so as to be relieved from residence under section 6 of the act of June 17, 1910 (36 Stat., 531), and her application was allowed by the Commissioner's letter of October 9, 1913.

Final proof was submitted November 12, 1915, wherein it was shown that 20 acres were cultivated in 1913, 40 acres in 1914, and a little over 40 acres in 1915. The Commissioner rejected the proof for the reason that the cultivation had not been performed for a period of 5 years.

The said act of June 17, 1910, provided for allowance of homestead entries for 320 acres, or less, of arid nonirrigable land in the State of Idaho. Section 6 of the act provided that where sufficient supply of water suitable for domestic purposes could not be found so as to make continuous residence upon the land possible, the Secretary may, in his discretion, designate such tracts as subject to entry

¹ See 45 L. D., 324 and 451.

under the act without the necessity of residence upon the land entered. Said section further provided:

That the entryman shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of said entry, and that after six months from date of entry and until final proof the entryman shall reside not more than twenty miles from said land and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work unless prevented by sickness or other unavoidable cause. Leave of absence from a residence established under this section may, however, be granted upon the same terms and conditions as are required of other homestead entrymen.

Contention is made that the period of cultivation specified in said section 6 was reduced by the three-year homestead law of June 6, 1912 (37 Stat., 123). The latter act provided generally for cultivation of specified areas for homestead entries under section 2289, Revised Statutes, it being required that not less than one-sixteenth of the area of the entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, be cultivated. It further provided that in cases of entries under section 6 of the enlarged homestead law double the areas specified shall be cultivated. The act also reduced the period of residence and cultivation to three years, but contained the following language:

The provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required.

The period of cultivation required by section 6 of the said act of June 17, 1910, is not affected by the three-year homestead law, because residence is not required upon entries under the former act. See section 9 of instructions of February 13, 1913, under the latter act (41 L. D., 483).

There is a suggestion in the record that the claimant is a widow of a soldier who served in the United States Army for about 4 years during the Civil War. However, no credit for such service can be allowed under section 2305, Revised Statutes, so as to reduce the required period of cultivation in connection with this entry. That law requires residence for at least one year upon a homestead entry as a condition for claiming credit for military service, and is not applicable to entries of this class which do not require residence and where the possibility of residence is not consistent with the character of lands subject to entry under section 6 of the enlarged homestead law.

The brief in support of the appeal also criticizes the requirements providing that an entrywoman under said section 6 must personally engage in preparing the soil for seed, and in cultivating and harvest-

ing the crops. It is urged that such requirement should not be imposed upon women who make such entries. In reply to this suggestion it may be stated that the Department has no authority to waive the plain requirements of the law. However, it is not deemed necessary to hold that a woman in order to perfect such entry must actually in person plow the soil or perform the physical labor of cultivating and harvesting the crops. It will be deemed compliance with law if such work be done under the personal supervision of the entrywoman.

No error is seen in the action of the Commissioner, and therefore the decision appealed from is affirmed.

ESTHER C. ROSE.

Decided August 16, 1916.

ENLARGED HOMESTEAD—ENTRY UNDER SECTION 6—MILITARY SERVICE.

Credit for military service may be allowed, under section 2305, R. S., on entries under section 6 of the enlarged homestead act of June 17, 1910, upon compliance with the provision of said section requiring residence, cultivation, and improvement for the period of at least one year.

JONES, First Assistant Secretary:

July 6, 1916 [45 L. D., 449], the Department affirmed the decision of the Commissioner of the General Land Office, rejecting final proof submitted by Esther C. Rose on enlarged homestead entry for lots 1 and 2 and the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 6, T. 1 N., R. 4 E., Boise, Idaho, land district. The entry was made September 19, 1912, under section 2289, Revised Statutes, but, upon claimant's application, was changed to an entry under section 6 of the act of June 17, 1910 (36 Stat., 531), by Commissioner's order of October 9, 1913.

Final proof was submitted November 12, 1915, showing cultivation for a period of three years, and rejected by the Commissioner on the ground that the applicable law requires five years' cultivation. The Department affirmed this holding and no reason is found to depart therefrom.

The departmental decision, however, in discussing the fact that entrywoman is the widow of a soldier who served in the United States Army during the Civil War, stated that no credit for such service could be allowed under section 2305, Revised Statutes, in connection with this entry. That portion of the decision is hereby modified so as to hold that entrywoman can, in connection with her claim under section 6 of the enlarged homestead act of 1910, take advantage of the military service of her husband only by complying with the requirements of section 2305, Revised Statutes, which provides that—

no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

Mrs. Rose must therefore either submit evidence of cultivation of the land entered for five years, to the extent and in the manner required by the act of June 17, 1910, *supra*, or submit evidence that she has resided upon, improved, and cultivated the homestead for a period of at least one year, or for such period as, when added to her husband's military service during war, will make up the full period of three years.

ROBERT TURNER.

Decided July 10, 1916.

REPAYMENT—DOUBLE MINIMUM EXCESS.

Where at the time of commutation of a homestead entry of lands within the primary limits of the grant to the Atlantic and Pacific Railroad Company made by act of July 27, 1866, the land was properly rated at \$2.50 per acre, under section 2357, Revised Statutes, and payment was made at that price, the entryman is not entitled to repayment, as excess, of any portion of the amount paid, because of the fact that the price of such lands was subsequently, by the act of July 16, 1886, reduced to \$1.25, that act having no retroactive effect.

JONES, *First Assistant Secretary*:

Robert Turner appealed from decision of February 26, 1916, denying repayment for a claimed excess paid on his commuted homestead entry for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, T. 6 N., R. 4 E., S. B. M., Los Angeles, California.

February 20, 1883, Turner made entry, which he commuted February 2, 1884, paying \$2.50 per acre. The land is within primary limits of grant to the Atlantic and Pacific Railroad Company by act of July 27, 1866 (14 Stat., 292). Map of definite location was filed March 12, 1872. The grant was forfeited for failure to construct the line by act of July 6, 1886 (24 Stat., 123). The price was reduced to minimum by act of March 2, 1889 (25 Stat., 854). There was no express provision raising the price of alternate even-numbered sections in the act making the grant, but the price was raised by section 2357, Revised Statutes, which provided:

That the price to be paid for alternate reserved lands along the lines of railroads within the limits granted by any act of Congress shall be \$2.50 per acre.

At the time this entry was made and commutation price was paid, the section last quoted fixed the price at \$2.50 per acre. Turner, therefore, paid no more than the fixed statutory price for the land at the time he commuted and made his payment. The act of July 6, 1886, *supra*, had no retroactive effect and did not make the payment an excess.

The decision of the Commissioner denying repayment was, therefore, without error and is affirmed.

ROBERT TURNER.

Motion for rehearing of departmental decision of July 10, 1916, 45 L. D., 452, denied by Assistant Secretary Sweeney, September 28, 1916.

ARNOLD v. BURGER.

Decided August 8, 1916.

NATURALIZATION—DECLARATION OF INTENTION—ACT JUNE 29, 1906.

In view of the conflicting decisions of the Federal courts, the Department declines in this case to pass upon the question whether a declaration of intention to become a citizen, filed prior to the naturalization act of June 29, 1906, must, in view of the provisions of that act, be consummated within seven years from the date that act became effective, or whether, if not so consummated, it continues in force and effect after the expiration of that period.

CONTESTANT—PREFERENCE RIGHT—SETTLEMENT BY ENTRYMAN.

After an entry has been canceled as the result of a contest, the right of the contestant to make entry in exercise of his preference right is a matter solely between him and the government, and the entryman has no longer any such interest in the land as entitles him to be heard with respect to the contestant's right of entry; nor does the entryman, by settlement and the filing of an application to make second entry of the land within the preference-right period, acquire any right as against the successful contestant.

CONTEST—QUALIFICATION OF ENTRYMAN—BURDEN OF PROOF.

The allowance of an entry to a successful contestant in exercise of his preference right constitutes a determination by the land department that he is *prima facie* entitled to such right, and one attacking such entry on the ground of the entryman's disqualification, assumes the burden to establish the truth of the charge.

JONES, *First Assistant Secretary:*

The homestead entry of Basil Arnold, made February 12, 1912, for the SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 2, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22; T. 26 N., R. 3 W., 6th P. M., Broken Bow, Nebraska, land district, was canceled April 30, 1915, upon the contest of John Burger.

May 22, 1915, within the preference right period, Arnold, who was then living on the land, filed application to reenter the land as a second homestead, which application was suspended to await the action of Burger under his preference right.

June 2, 1915, within the preference right period, Burger filed application to make homestead entry of the land, and Arnold's suspended application was thereupon rejected, from which action Arnold appealed.

June 7, 1915, Arnold filed what is denominated an "application to determine preference right," alleging, in substance, that Burger was at the initiation and during the prosecution of said contest an alien and not a qualified contestant and therefore was not entitled to preference right to enter the land. This was treated by the local officers as a contest against Burger's entry and notice was issued thereon and hearing had.

The record shows that Burger on March 16, 1906, filed his declaration of intention to become a citizen of the United States, and on May 28, 1915, being in doubt as to whether his first declaration was still in force, filed a second declaration of intention.

The local officers found that Burger's right under his first declaration had expired prior to his contest against Arnold's entry, and that Arnold having filed application to make second entry prior to the time Burger made new declaration of intention, Burger was not entitled to a preference right of entry, and accordingly recommended that his entry be canceled and Arnold's application allowed, provided Arnold should show himself qualified to make second entry of the land.

Burger appealed, and the General Land Office, by decision of March 23, 1916, held his entry intact and rejected the application of Arnold. Arnold appealed to the Department.

The naturalization law of June 29, 1906 (34 Stat., 596), effective from and after September 28, 1906, declares that final petition for naturalization should be filed within not less than two nor more than seven years after the filing of the declaration of intention to become a citizen. The law prior to that act fixed no limitation upon the time within which final petition might be filed. The act of 1906 specifically provides that no alien who in conformity with the law in force at the time of his declaration has declared his intention to become a citizen shall be required to renew said application.

The local officers held Burger's entry for cancellation on the theory that he falls within the seven-year limitation fixed by the act of June 29, 1906, *supra*, and that more than seven years having expired since that act went into effect, all rights under his first declaration had ceased; whereas the General Land Office reversed that decision on authority of *In re Anderson* (214 Fed. Rep., 662), holding that a declaration filed prior to the adoption of that act continues in force and is available to sustain a petition for naturalization though not filed until more than seven years after that act became effective.

This precise question has been frequently considered by the Federal courts, there being eight reported decisions thereon. In four cases (*Eichhorst v. Lindsey*, 209 Fed. Rep., 708, Dist. Ct., West. Dist., Pa.; *In re Anderson*, 214 Fed. Rep., 662, Dist. Ct., West. Dist., Tex.; *United States v. Lengyel et al.*, 220 Fed. Rep., 720, Dist. Ct., West. Dist., Pa.; and *In re Fleury*, 223 Fed. Rep., 803, Dist. Ct., East. Dist., N. Y.), it was held that a declaration of intention filed prior to the act of June 29, 1906, *supra*, continued in force after the expiration of seven years from the date that act became effective; whereas, in four other cases (*In re Yunghauss*, 210 Fed. Rep., 545, Dist. Ct., Sou. Dist., N. Y.; *In re Goldstein et al.*, 211 Fed. Rep., 162, Dist. Ct. East. Dist., N. Y.; *In re Yunghauss*, 218 Fed. Rep., 168, C. C. A., 2nd Cir.; and *Harmon v. United States*, 223 Fed. Rep., 424, C. C. A., 1st Cir.), it was held that declarations of intention filed prior to said act are no longer effective after the expiration of seven years from the date that act became operative.

In view of the chaotic state of this question in the Federal courts, the Department can not, in the absence of an authoritative interpretation of this provision by the Supreme Court of the United States, undertake to determine which of the contrary views expressed by the Federal courts is correct. Nor is it necessary to a determination of this case that that question be passed upon.

After cancellation of Arnold's entry as result of Burger's contest, the latter's right to make entry in exercise of his preference right was a matter solely between him and the government. The Department has held that after an entry has been regularly canceled as result of a contest the entryman has no interest in the land that entitles him to be heard with respect to the contestant's right of entry (*Logue v. O'Connor*, 12 L. D., 32; *Thorbjornson v. Hindman*, 38 L. D., 335). And even though, as in this case, the entryman makes settlement and files application to make second entry of the land, he does not thereby acquire any rights as against the successful contestant (*Nauha v. Smallwood*, 39 L. D., 465; *Thorbjornson v. Hindman*, *supra*). In *Lerne v. Martin* (5 L. D., 259), and in *Bjorndahl v. Morben* (17 L. D., 530), the Department held that an alien might contest a homestead entry and secure a preference right of entry, provided he is qualified in the matter of citizenship when he applies to enter. In the present case, whatever may be Burger's status under his first declaration of intention, he was, by virtue of his second declaration, unquestionably qualified in the matter of citizenship at the time he filed his application to enter.

It is true that Rule 2 of Practice requires a contestant to state under what law he intends to acquire title and to show that he is qualified to do so. This requirement Burger met, as to his qualification in the matter of citizenship, by the statement in his affidavit

of contest that he had declared his intention to become a citizen. This statement was true, and the Department is not convinced, in view of the conflicting decisions of the courts, *supra*, that the declaration of intention then referred to was not then and is not now in full force and effect. The affidavit of contest was accepted by the local officers, jurisdiction acquired by issuance and service of notice thereon, and the contest prosecuted to successful conclusion. Burger would therefore seem to have met the requirements of section 2 of the act of May 14, 1880 (21 Stat., 140), having contested, paid the fees, and procured the cancellation of Arnold's entry, and was entitled to the preference right of entry. By the very act of allowing Burger to make entry in exercise of his preference right, the land department decided that he was *prima facie* entitled to such right. The burden was therefore upon any one attacking such entry on the ground of entryman's disqualification to clearly establish the truth of that charge. This Arnold has failed to do.

The action of the Commissioner rejecting Arnold's application and holding Burger's entry intact is affirmed.

OLOF GUSTAFSON.

Decided August 10, 1916.

RED LAKE INDIAN LANDS—HOMESTEAD ENTRY—ACT OF FEBRUARY 20, 1904.

The provision in section 3 of the act of February 20, 1904, authorizing the sale of the ceded Red Lake Indian lands remaining unsold at the expiration of five years from the date of the first sale under that act without any conditions except the payment of the purchase price, was repealed by the act of February 16, 1911, after which date said lands were subject to appropriation only by homestead entry and the payment of the purchase price as provided by said latter act.

JONES, *First Assistant Secretary*:

Olof Gustafson made entry May 15, 1915, for the SW. $\frac{1}{4}$, Sec. 14, T. 154 N., R. 36 W., Crookston, Minnesota, land district, under the act of May 20, 1908 (35 Stat., 169), which was held for cancellation by the Commissioner of the General Land Office on October 15, 1915, and again on May 16, 1916, for the reason that entryman, on June 11, 1902, made homestead entry for 160 acres of land, upon which patent issued November 8, 1913. From this action of the Commissioner Gustafson has appealed.

The act under which the entry was made limits the benefits thereof to persons having the qualifications of a homestead entryman; but it is urged that since the land is within that portion of the Red Lake Indian Reservation ceded to the United States in 1902, the provisions of the act of February 20, 1904 (33 Stat., 46), authorizing the sale thereof to persons who may have theretofore exhausted their

rights under the homestead laws, applies herein. Section 3 of said act provides that the ceded lands shall be sold for the benefit of the Indians, subject to the homestead laws of the United States, under rules and regulations to be prescribed by the Secretary of the Interior, for not less than \$4 per acre; and that—

all lands above described which shall remain unsold at the expiration of five years from the date of the first sale hereunder shall be offered for sale at not less than four dollars per acre (and lands remaining unsold after such sale shall be subject to private entry and sold at said price), without any conditions whatever except the payment of the purchase price.

More than 5 years have expired since the date of the first sale, and entryman made cash entry for the lands in accordance with the above provisions, but has not attempted to make homestead entry therefor. Prior, however, to the date of filing his application to enter, the act of February 16, 1911 (36 Stat., 913), was passed, which provides as follows:

That hereafter all lands ceded under the act entitled "An act to authorize the sale of what is known as the Red Lake Indian Reservation, in Minnesota," approved February twentieth, nineteen hundred and four, and undisposed of, shall be subject to homestead entry at the price of four dollars per acre, payable as provided in section three of said act, for all lands not heretofore entered; and for all lands embraced in canceled entries the price shall be the same as that at which they were originally entered: *Provided*, That where such entries have been or shall hereafter be canceled pursuant to contests, the contestant shall have a preference right to enter the land embraced in such canceled entry, as prescribed in the act of July twenty-sixth, eighteen hundred and ninety-two: *Provided further*, That all lands entered under this act shall, in addition to the payments herein provided for, be subject to drainage charges, if any, authorized under the act entitled "An act to authorize the drainage of certain lands in the State of Minnesota," approved May twentieth, nineteen hundred and eight. (Twenty-seventh Statutes, page two hundred and seventy.)

The only question presented in this case is whether it was intended by the above act to repeal the act of February 20, 1904, *supra*, in so far as the latter provided for the sale for cash, independent of the homestead laws, of the unsold portion of such ceded lands. That it was so intended clearly appears from the report made by the Committee on Public Lands of the House of Representatives on the bill as originally introduced. The following excerpt is taken therefrom:

Under an act passed February 20, 1904, in regard to certain lands ceded by the Red Lake Indians, the 43,000 acres (remaining unsold) referred to in this bill are directed to be sold without any restriction as to the amount to be sold to any purchaser or the price to be paid therefor.

The bill requires that the purchasers pay not less than \$4 per acre *and that in addition thereto they make homestead entries and comply with the homestead laws*. Its design is to prevent the land from passing into the hands of speculators. This is a remnant of certain Indian lands from which has been eliminated nearly all of the lands of any value. Until within a year or two they have been considered too wet for settlement, but since the passage of the

act referred to in the proposed amendment it has been possible to drain much of this land so as to make it desirable for homes. (Emphasis mine.)

(See H. R. Report, No. 2043, of February 2, 1911, 61st Congress, 3d Session.)

It follows that the land is not subject to sale under the provisions of section 3 of the act of February 20, 1904, *supra*, and the decision of the Commissioner in holding the entry for cancellation is therefore affirmed.

GAUSS ET AL. v. STATE OF MONTANA.

Decided August 10, 1916.

CONTEST AGAINST SCHOOL INDEMNITY SELECTION—DISCRETION OF COMMISSIONER.

While the Commissioner of the General Land Office may, in his discretion, avail himself of the aid of a contestant to determine the validity or invalidity of a school indemnity selection, his refusal to accept such aid is not the denial of a legal right, and his exercise of discretion in such matter will not be controlled by the Department unless abuse thereof is clearly apparent.

JONES, *First Acting Secretary*:

This case is before the Department upon motion of Julius H. P. Gauss and Julian A. Sutter for rehearing of its decision of June 26, 1916, rejecting their separate applications to contest the State of Montana's indemnity school selection of Sec. 33, T. 23 N., R. 11 E., Great Falls, Montana, land district.

The State selected all of said section May 16, 1910, in lieu of Sec. 36, T. 11 N., R. 1 E., within a national forest created prior to said date. Said selection has not been approved but is intact upon the records.

July 23, 1915, Sutter filed contest against the S. $\frac{1}{2}$ of said section, and July 27, 1915, Gauss filed contest against the N. $\frac{1}{2}$ of said section. Each alleged in substance that the selection was void because the base was unsurveyed land within a forest reserve. The local officers rejected said applications which action was affirmed by the Commissioner of the General Land Office February 25, 1916, upon the ground that no statutory right exists for contest of State selections.

The department decision of which review is asked, in affirming the decision of the Commissioner, said that all of the matters alleged in the contest affidavits are of record in the land department and that consequently—

there is no need of the aid of an informant in these cases and the courtesy due the States forbids that contest should be permitted.

Rule 1 of Practice, provides that—

Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under the laws of Congress relating to the public lands, because of priority

of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the land department.

It is urged on behalf of the applicants to contest that in order to bring the case within the last clause of said rule, and thus warrant the denial of the application, "final judgment holding that a selection of this kind could not be made," must have been entered in the case, that no such decision has been rendered and the applicants ask to be allowed to prove that such a decision should exist; that the selection is either valid or invalid. If valid, applicants have prior rights which must be respected.

In the case of *Harrington et al. v. Clarke* (40 L. D., 197), wherein plaintiffs applied to contest a forest lieu selection for invalidity of base, it was held that while—

the Commissioner may avail himself of the aid of a contestant in determining the validity or invalidity of a lieu land selection, his refusal to accept such aid is not a denial of a legal right and his exercise of discretion in such matters will not be controlled by the Department unless it is clearly apparent that it has been abused.

In the quite similar case of *Christy v. Clarke*, unreported, wherein decision was rendered September 5, 1912, the petition sought the exercise of the supervisory authority of the Secretary to review and correct errors in the decision of the Commissioner and was based upon the theory that a right of contest leading to a preference right of entry, if successful, existed against forest lieu selections. It was held that—

Preference right of entry exists only where given by statute, and no statute has been enacted giving such a right in regard to forest lieu selections.

See also instructions in 43 L. D., 119, wherein the same doctrine was declared, based upon the construction of the act of May 14, 1880 (21 Stat., 140).

The same principles are unquestionably applicable to school indemnity as to lieu land selections, and no abuse of discretion by the Commissioner in denying the application to contest in this case is shown. His action had ample warrant under the foregoing and other departmental decisions in similar cases.

There does not appear to be any good ground to warrant the holding as asked by the applicants that the land department is not in possession of "records" relating to the legality or validity of the claim, sufficient to render decision in the case without the aid of a contest and hearing.

The Government allows parties to contest homestead and certain other kinds of entries under the promise of preference right of entry of the land in case of their furnishing evidence upon which said entries are canceled. The purpose of the Government in making

such offer is to stimulate the furnishing of evidence of the failure of entrymen to comply with the law under which entries were made.

It is not found that any good ground is disclosed for granting a rehearing in this case with a view to allowing the applications of the plaintiffs to contest the State selections involved. The motion therefor is accordingly denied.

WEST ELK LAND AND LIVE STOCK CO. v. TELCK.

Decided August 14, 1916.

NOTATION OF RIGHTS OF WAY IN PATENTS.

There being no statutory provision requiring final certificates and patents issued upon homestead entries of lands over which pass rights of way acquired under the act of March 3, 1891, to contain a notation of exception thereof, and such notation not being necessary to the protection or preservation of such rights of way, the land department declines to include such notation in the final certificates and patents.

JONES, *First Assistant Secretary*:

The West Elk Land & Live Stock Company has appealed from the decision of the Commissioner of the General Land Office of March 13, 1916, rejecting its conditional protest, filed November 26, 1915, against the issuance of final certificate and patent to Joe Telck, on his homestead entry made June 1, 1909, for an unsurveyed tract of land, formerly in a forest reserve, under the act of June 11, 1906 (34 Stat., 233), being approximately 42.20 acres in area.

The protest is based on the fact that a portion of said land is included in the Park Reservoir site, owned by the West Elk Land & Live Stock Company, and constructed under the act of March 3, 1891 (26 Stat., 1095). There is no question of noncompliance with the law on the part of Telck, and the only question presented, as stated by the protestant, is—

whether any final certificate or patent issued to Joe Telck should specifically recite that it is issued or executed subject to the right of way of the Park Reservoir, the property of the West Elk Land & Live Stock Company.

The company claims a right of way under said act of 1891, and alleges that the reservoir was in course of construction on the date of the allowance of Telck's entry. This act provides for granting a right of way through public lands and reservations of the United States to any canal or ditch company that complies with the provisions thereof, and by section 19 provides, with reference to lands disposed of after the rights have been acquired under said act, that:

All such lands over which such rights of way shall pass shall be disposed of subject to such right of way.

It is claimed, on behalf of the company, that this clause necessitates the inclusion in the final certificate and patent of the clause contended for.

Only such exceptions can be included in patents to public lands as are specifically prescribed by law, and the inclusion of any others therein would be wholly without effect. *Deffebach v. Hawke*, 115 U. S., 392; *Davis's Administrator v. Weibbold*, 139 U. S., 507. There is no statutory provision for the inclusion in the patent of the reservation desired, and the same can not, therefore, be included. The previous practice of noting upon patents all rights of way and permits was discontinued by regulation of April 14, 1915 (44 L. D., 6).

The act of March 3, 1875 (18 Stat., 482), granting rights of way to railroad companies, contains a provision identical with that above quoted, and patents to public lands do not contain any exception of such rights of way. In the case of *Dunlap v. Shingle Springs and Placerville R. R. Co.* (23 L. D., 67), it was held with reference to this act (syllabus):

A railroad right of way under the act of March 3, 1875, is fully protected by the terms of the act as against subsequent adverse rights, and a reservation of such right of way, in final certificate and patents issued for lands traversed thereby, is therefore not necessary, and should not be inserted.

The rights of the Company in this case are fully protected by the statute under which the same are granted, and furthermore, patent, when issued to Telck, will contain the following clause:

Subject to any vested and approved water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts.

The protest was properly dismissed by the Commissioner and his decision is affirmed.

CONE v. STATE OF NEW MEXICO.

Decided August 18, 1916.

ENLARGED HOMESTEAD—SETTLEMENT CLAIM—ACT OF AUGUST 9, 1912.

The plowing of a plain furrow around a settlement claim is a sufficient marking thereof within the meaning of the act of August 9, 1912, requiring the exterior boundaries of settlement claims under the enlarged homestead acts to be "plainly marked."

BOUNDARIES OF SETTLEMENT CLAIM—MARKINGS.

It is not essential that a settler shall himself mark the boundaries of his claim, and where at the time of settlement the boundaries are plainly marked by a furrow placed there by a prior intending settler who has abandoned all claim thereto, such marking is sufficient to meet the requirements of the act of August 9, 1912.

SUFFICIENCY OF MARKING OF SETTLEMENT CLAIM.

Where two settlers together claim an entire section, a plain furrow plowed around the outer boundaries of the section is a sufficient marking of the settlement claims within the meaning of the act of August 9, 1912, regardless of whether the dividing line between the claims is marked or not.

JONES, First Assistant Secretary:

December 15, 1914, at 9 o'clock a. m., the plat of survey of T. 11 S., R. 23 E., was filed in the local office at Roswell, New Mexico. At the same time the State of New Mexico filed its list of selections embracing, among other lands, the E. $\frac{1}{2}$ of section 19, said township and range, under section 7 of the act of June 20, 1910 (36 Stat., 557), making a grant of one million acres of public lands to the State "for the payment of the bonds and accrued interest thereon, issued by Grant and Santa Fe counties."

December 18, 1914, Rosa Cone applied to make homestead entry for the same land, which application was rejected for conflict with the State's selection. Cone alleging prior settlement on December 13, 1914, hearing was had, and, upon testimony adduced, the local officers found the allegation of prior settlement established as to the entire tract and held the State's selection for rejection and Cone's application for allowance.

Upon appeal by the State the Commissioner of the General Land Office held Cone entitled to the SE. $\frac{1}{4}$ of said section 19, by reason of prior settlement thereon, and held the State entitled to the NE. $\frac{1}{4}$ thereof under its selection. The action of the Commissioner was based upon the finding by him that there was no showing that the boundaries of Cone's settlement claim were plainly marked, as required by the act of August 9, 1912 (37 Stat., 267), and that, therefore, her claim should be limited to the SE. $\frac{1}{4}$ —the technical legal subdivision upon which her improvements were located. The State acquiesced in this decision, but Cone has appealed to the Department.

At the hearing had in this case the testimony was confined to the *fact* and *sufficiency* of settlement, no question being raised by anyone as to the *extent* of Cone's settlement claim. The local officers found the settlement good as to the entire 320 acres involved. In its appeal to the Commissioner the State raised no question as to the marking of the boundaries of the claim. Apparently the Commissioner raised the question on his own initiative and rejected Cone's settlement claim as to the NE. $\frac{1}{4}$ without affording her any opportunity to show whether, in fact, the boundaries of her settlement claim were marked, as required by the act of August 9, 1912, *supra*.

The act of August 9, 1912, provides:

That section three of the act of Congress approved May fourteenth, eighteen hundred and eighty (Twenty-first Statutes at Large, page one hundred and forty), be, and the same is hereby, amended by adding thereto the following:

Provided, That any settler upon lands designated by The Secretary of the Interior as subject to the provisions of sections one to five of the enlarged homestead acts of February nineteenth, nineteen hundred and nine (Thirty-fifth Statutes at Large, page six hundred and thirty-nine), and June seventeenth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page five hundred and thirty-one), shall be entitled to the preference right of entry accorded by this section, provided he shall have plainly marked the exterior boundaries of the lands claimed as his homestead.

With her appeal to the Department Cone files the joint affidavit of three persons, wherein the affiants swear that on April 15, 1914, they plainly marked the outer boundaries of said section 19, embracing the claims of Rosa Cone and her brother Virgil M. Cone, by plowing a plain furrow around the same with a turning plow, and that the boundaries of said section were so plainly marked on the date her application to enter was filed.

The plowing of a furrow is a method frequently adopted by settlers on the public domain to mark the boundaries of their settlement claims, and where such furrow is plain and sufficient to attract the attention of a person crossing it, it will be accepted by the Department as a sufficient marking within the meaning of the act of August 9, 1912, *supra*.

It appears that the marking alleged in the affidavit above referred to was made by affiants April 15, 1914, for their own benefit when they contemplated settling on this land, whereas Cone does not claim settlement until December 13, 1914. If, however, the marking alleged to have been made by affiants was still existent and plainly to be seen, as stated in the affidavit, at the date of Cone's settlement, it is immaterial that it was not made by her or at her instance. The adoption of such marking was as efficacious as if she had placed it there herself.

It being alleged in the affidavit that the furrow referred to was plowed around the entire outer boundaries of said section 19, and applicant herein claiming the east half of said section and her brother the west half, it is immaterial whether the dividing line between their claims was marked or not. Any intending settler or applicant entering this section from any point of the compass was bound to cross the furrow and would be put on notice that he was entering upon land claimed by someone else. Upon following such marking it would have been ascertained that the entire section was claimed. It would thereupon devolve upon such intending settler or applicant to make diligent inquiry to ascertain what claims were being asserted to the land within the marked boundary. Such inquiry made at any time after the settlement of Cone would have developed the fact and extent of her settlement claim.

The only question for determination therefore is whether the outer boundaries of section 19 were plainly marked, as alleged in

the affidavit, on December 13, 1914, the date of Cone's settlement upon the east half of said section, and so remained at the date of the filing of the State's selection.

If after due notice, and within a time fixed therein, the State does not deny the fact of marking as alleged in the affidavit referred to, such affidavit will be accepted as sufficient evidence that the boundaries of Cone's claim were plainly marked as required by the act of August 9, 1912, *supra*, prior to and at the time of the State's selection, and her application will be allowed as to the entire east half of said section 19 and the State's selection canceled as to that tract.

If, however, the State, within the time fixed in the notice, challenges the truth of the allegations in the affidavit as to the marking of the claim, a hearing will be ordered for the purpose of determining whether the claim was plainly marked as alleged.

The decision appealed from is accordingly modified and the case remanded for further proceedings in accordance herewith.

HENRY HILDRETH.

Decided August 31, 1916.

WITHDRAWAL—MINERAL LAND—BURDEN OF PROOF.

A withdrawal of land for inclusion in a petroleum reserve, based upon an examination and report of its mineral character, establishes *prima facie* its character as mineral, and one thereafter seeking classification of the land as nonmineral assumes the burden of proof to overcome such *prima facie* established mineral character.

SWEENEY, *Assistant Secretary*:

Henry Hildreth appealed from decision of February 29, 1916, denying his application for classification of his desert-land entry for fractional NW. $\frac{1}{4}$, Sec. 18, T. 27 S., R. 23 E., M. D. M., Visalia, California, and of its withholding final certificate on his entry on the ground that the land is included in Petroleum Reserve No. 23 by Executive Order of September 14, 1911.

November 3, 1909, Hildreth made desert-land entry on which he submitted final proof May 16, 1913. No objection is made to the sufficiency of the final proof. As the land had been withdrawn, the Commissioner allowed claimant to apply for a hearing at which the burden of proof would be upon him to show that the land is not oil and gas bearing in character. In default of such application, the entry and final proof were held for rejection.

September 16, 1915, Hildreth filed a motion for reclassification, tending to show that the land is not oil in character; that a well bored by the Union Oil Company four miles west of the land to a depth of

4,000 feet had been abandoned without finding oil; a well $1\frac{1}{4}$ miles north of the land was bored a thousand feet and no mineral discovered; a well bored in section 6 of the same township to a depth of 1,800 feet resulted in discovery of no mineral; other wells bored in sections 9 and 16 of said township failed to develop mineral; and no wells have been bored for a distance of many miles southerly. With the application was the affidavit of Paul M. Paine, an alumnus of the Massachusetts Institute of Technology, who had been connected with various mining works in Montana, Idaho and Utah from 1904 to 1910, when he was made a special agent on mineral in the General Land Office in Oklahoma, California and Nevada, and since that time employed in the oil fields of San Joaquin Valley as superintendent and engineer in oil mining operations. His affidavit was to the effect that wells drilled in this vicinity were watched by him and the operations carefully noted and he could never discover the presence of oil or gas; that unsuccessful prospecting wells had been drilled in section 5, T. 27 S., R. 23 E., and section 15 same township, and for these reasons he is satisfied that the land involved herein is not mineral and contains no petroleum or gas.

The record also shows a report, August 31, 1914, of F. Oskar Martin, Mineral Inspector of the General Land Office, who inspected the entry and the probability of oil existing thereunder, recommending the entry be passed to patent as nonmineral in character.

The application and accompanying affidavit were referred to the Geological Survey, and the Director reported February 8, 1916, that he had carefully considered the application and affidavit and saw no reason to change his recommendation of November 11, 1915, that the papers do not prove the non-oil character of the land, recommending the application for classification as non-oil be denied.

The appeal insisted that a withdrawal of this character has merely the effect of the mineral report of a surveyor, and further contending that—

The matter of placing the burden of proof is a question of law to be determined in each individual case. The Department cannot by the issuance of a circular, set aside a leading rule of evidence and demand of the entryman a greater degree of proof than he would be required to produce in a court of law.

"The party who makes proofs which are accepted by the local land officers, and pays his money for the land has acquired an interest of which he cannot be arbitrarily dispossessed. The Government holds the legal title in trust for him and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing." *Orchard v. Alexander*, 157 U. S., 372.

In such case hearing must be one in which the agricultural character of the land is attacked and the affirmative of the issue assumed by the party attacking.

Appellant protests vigorously against the Geological Survey being allowed to make a decision in this case, requests that his application for classification be

returned to the General Land Office for proper action by qualified officers thereof, and respectfully submits that the order for hearing to determine the character of the land in question with the burden of proof on the claimant be vacated and set aside.

In view of the Department, the contentions above quoted are not applicable to the case. There has been an examination of the land, a report of its mineral character and a withdrawal by the Executive. This establishes *prima facie* its mineral character. Hildreth is permitted by the Commissioner to assume the burden of proof and show the nonmineral character of the land, otherwise its *prima facie* character as mineral must stand established. The decision is affirmed.

MILLER v. HEIRS OF KIRKENDALL.

Decided September 1, 1916.

PROOF OF PAROL CONTRACT TO RELINQUISH.

Proof of a contract by an entryman to relinquish a portion of his entry in favor of a prior settlement claim, not in writing but resting only in parol, should not be accepted after the entryman is dead and can make no defense.

SWEENEY, *Assistant Secretary*:

Andrew Miller filed motion for rehearing of departmental decision of July 22, 1916 [not reported], dismissing his contest against heirs of Ashley Kirkendall, involving NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, T. 16 N., R. 6 E., M. M., Great Falls, Montana.

Plat of survey of the E. $\frac{1}{2}$, Sec. 32, and other lands included in Kirkendall's entry, was filed in the local office February 1, 1897. November 10, 1902, Kirkendall made entry and died in January, 1907. Final proof was offered by his heirs November 15th of that year. November 12, 1907, Miller filed contest against the entry, alleging prior settlement on the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32. By concurring decisions of the local office, the Commissioner and the Department the contest was dismissed, as no service had been made until after final proof by Kirkendall's heirs. Service on some of the heirs was not made until March 24, 1915. The Department held that though Miller showed a prior right to enter said forty-acre tract, had he exercised his right in time, it was lost by failure to begin his proceedings within three months after date of filing of the plat. Miller relied on a promise of Kirkendall to relinquish this tract to him as excuse for his delay. He sought to excuse his delay by the fact that plat of survey of the W. $\frac{1}{2}$ of Sec. 32 was not filed until December 20, 1907. This was no excuse, as the act of May 14, 1880 (21 Stat., 140), and section 2266, Revised Statutes, give a settler but three months in which to claim right of entry to land upon which he has settled. If he fails to make his claim known within three months

after filing of the plat the land is open to entry by the next qualified settler.

As for any agreement of Kirkendall waiving his right, it must be noted that the contract is not claimed to have been in writing and Kirkendall is dead, so that proof must rest in parol. Proof of such a contract waiving a right given by statute ought not to be allowed after the promisor is dead and can make no defense. The motion therefore shows no reason to vacate or recall said departmental decision, which is adhered to, and the motion is denied.

FISHER v. KELLY.

Decided September 8, 1916.

INSANE ENTRYMAN—CONTEST—SERVICE OF NOTICE.

Service of notice of contest against an entryman legally adjudged insane may be made by delivering a copy of the notice to the statutory guardian or committee of the entryman.

INSANE ENTRYMAN—ACT OF JUNE 8, 1880.

The act of June 8, 1880, providing for the protection of the rights of homestead settlers who become insane, has no application where the entryman prior to becoming insane failed to comply with the law in good faith.

VOGELSANG, *First Assistant Secretary*:

This case involves homestead entry 016063 made October 4, 1912, by Lawrence L. Kelly, under the act of February 19, 1909 (35 Stat., 639), for lot 1, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 2, T. 11 N., R. 37 E., M. P. M., Miles City, Montana. The entry contains 320 acres and final proof has not been submitted. The township appears to have been designated May 1, 1909, under the act of February 19, 1909, *supra*.

March 30, 1915, Fred A. Fisher filed contest against the entry, alleging in general that the entryman had never established residence upon the land since date of entry; that he had wholly failed to cultivate or improve the same in any manner whatsoever for more than two years prior to date of filing of the affidavit.

It appears that the entryman was on February 9, 1914, committed to the State insane asylum and that on February 27, 1915, Sever Hagen was duly appointed guardian of the person and estate of the said Lawrence L. Kelly, and the latter at the date of filing of contest was confined in the insane asylum.

Notice of the charges was issued and service was had on the entryman's guardian, Sever Hagen, April 17, 1915, and Hagen filed answer on May 13, 1915.

Hearing was had before a U. S. Commissioner at Forsyth, Montana, July 6, 1915, when the contestant appeared in person and by attorney;

Sever Hagen, guardian of Lawrence L. Kelly, also was present on behalf of the entryman and was represented by attorney.

Considerable testimony was taken on the part of the contestant and witnesses were cross-examined. The contestee, through his guardian, also submitted testimony.

The register and receiver held that the notice was defective as to the affidavit of contest, which was against Lawrence L. Kelly, the entryman, and personal service was had on Hagen as guardian of Kelly; that they had no jurisdiction to pass upon the testimony, etc. On appeal the Commissioner of the General Land Office, March 30, 1916, reversed the action of the register and receiver and held that these officers had jurisdiction of the case; that the notice was properly given and on the merits of the case found that the contest affidavit was substantially proved. A further appeal brings the case to this Department.

The Commissioner calls attention to the fact that the new rules of practice in force when the contest herein was initiated seem not to have provided for service of notice of contest in cases where the entryman became insane. The Commissioner regarded this as apparently a *casus omissus* and that the mode of procedure as prescribed by the old rules of practice should in such case be followed. Rule 9 of the old rules of practice provides that if the person to be served has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such person of unsound mind, if there be one. This mode of procedure seems to have been followed by contestant and service was had precisely as provided in old rule 9 of practice.

There can be no doubt that Hagen was the guardian of the person and property of the insane entryman. While he did not sign the answer to the contest as guardian, yet it is shown that he was such guardian, certified copies of the letters having been filed in the case.

Just when the entryman became insane is not quite clear. In the testimony given before the District Court of the 13th Judicial District of the State of Montana regarding the examination into the sanity of Lawrence L. Kelly, the entryman, it is stated by one of the witnesses that Kelly became insane in November, 1913, which was nearly one year after he made homestead entry. However this may be, it is clear from the testimony that entryman never established residence upon the land or did anything with relation thereto after the entry was made. Having failed to make settlement upon the land, the act of June 8, 1880 (21 Stat., 166); gives no relief to the entryman, for that act provides that in all cases where parties who regularly initiated claims to public lands as settlers thereon, according to the provisions of the preemption or homestead laws, have become insane or shall hereafter become insane before the expiration of

the time during which their residence, cultivation or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them, and thereupon their claims shall be confirmed and patented, provided the parties comply in good faith with the legal requirements up to the time of their becoming insane.

The Department is of the opinion that proper service was made upon this entryman and that the allegations in the contest affidavit were clearly established.

The action appealed from is accordingly affirmed.

STATE OF FLORIDA ET AL. v. SMITH.

Decided September 8, 1916.

VALENTINE SCRIP—UNSURVEYED LAND—ADJUSTMENT.

Valentine scrip may be located upon unsurveyed lands, and the locator has three months from the filing of the township plat of survey within which to adjust the location to legal subdivisions.

VALENTINE SCRIP—NONCONTIGUOUS TRACTS.

A location of Valentine scrip may embrace noncontiguous tracts.

VOGELSANG, *First Assistant Secretary*:

The State of Florida and G. L. Miller have appealed from decision of April 26, 1916, by the Commissioner of the General Land Office, rejecting the application of the State to select as indemnity lot 5, section 8, and lot 1, Sec. 17, T. 53 S., R. 42 E., T. M., containing .32 of an acre, an island known as Bird Key, in lieu of loss of an equal area because of deficiency in another township, and also dismissing the protest of G. L. Miller against the Valentine scrip location filed by A. V. S. Smith for said land on March 22, 1915.

It appears that Miller applied to the Commissioner of the General Land Office for the survey of the said island and that the survey was duly ordered and was completed in the field January 14, 1915. The plat was officially filed in the local land office November 1, 1915 and on that day the State of Florida filed its indemnity school selection. Miller claims some equities by reason of having filed application for the survey, but the Commissioner held that he could gain no preference right thereby, and inasmuch as he alleged no settlement, he had no claim as against the scrip location of Smith.

Other objections against Smith's location are urged by the State and Miller. It is contended that as the lands had been surveyed in the field prior to the location, they were not subject to location until the plat had been officially filed and the land thus opened to general

entry. This contention is untenable. The act of April 5, 1872 (17 Stat., 649), providing for the issuance of scrip to Thomas B. Valentine, authorized the issuance of scrip for an area equal to his claim in lieu of which the scrip was to be given, and provided for its location upon a quantity of unoccupied and unappropriated public lands of the United States, not mineral and in tracts not less than the subdivisions provided for in the United States land laws; and further provided, that if the lands thus selected are unsurveyed when taken, the location shall be conformed when surveyed to the general system of United States land surveys.

It is held that lands have the status of unsurveyed lands until the plat of survey has been officially approved, but it is immaterial in this case, as Valentine scrip may be located upon either surveyed or unsurveyed land. This land was not withdrawn from settlement, and it was subject to filing or location prior to the filing of the survey plat under any appropriate law permitting filings or locations upon unsurveyed lands.

A further objection is urged that if Smith gained any right by the filing of the scrip, he lost such right by not appearing on the day the plat of survey was officially filed to conform his location to the survey. It appears that he filed his application for adjustment on November 4, 1915. The Commissioner held that he was entitled to 90 days within which to adjust the location to the plat. This holding is disputed by the protestants. The instructions of June 17, 1874 (Copp's Public Land Laws, 806), for the location of Valentine scrip, provide that within three months from the date of the receipt by the register of the official plat of survey of the township, the party who may have filed the said scrip will be required to appear and designate upon the official plat the specific subdivision embraced in the filing. They further provide that if the applicant should fail to appear within the specified three months, the local officers are to immediately thereafter proceed to adjust the filing as nearly as practicable from the map and description filed by the party, and if they are unable to determine the particular adjustment to be made, they are to report the fact and forward the papers to the General Land Office. In view of these instructions and the practice pertaining to claims and entries generally upon unsurveyed lands, it must be held that this objection is without merit.

A still further objection to the location is that the filing included not only the land here in dispute but also another tract in another township not contiguous to the land in question. No residence is required in completion of a Valentine scrip location, and no reason is seen why such a filing may not include non-contiguous tracts. In this respect, Valentine scrip is similar to a soldiers' additional right under section 2306, Revised Statutes, which may be located

upon non-contiguous tracts. (See case of Edgar Boice, 29 L. D., 599.)

Reference is also made to the protest of Clyde Partridge, who alleges settlement upon the land prior to the notice posted thereon under the scrip location. There are a number of affidavits in the record purporting to show that Partridge was not claiming settlement at the time the notice was posted on the land and it may be that a hearing will be necessary to determine the question of settlement. However, the Commissioner suspended action on the protest of Partridge, awaiting the final action on the protest of Miller and the application of the State to select. It is urged, however, by the appellants that the whole matter should be united and made a subject of decision. It would appear, however, that the claim of Partridge is entirely separate and distinct from that of the State and Miller, and that the appellants can have no interest in the issue as between Smith and Partridge. Smith appears to have the prior and superior right as against the State and Miller and his claim can only be defeated if at all by Partridge upon showing of prior settlement.

Therefore the action of the Commissioner is affirmed.

HAMILTON v. STATE OF CALIFORNIA.

Decided September 12, 1916.

UNSURVEYED DESERT LAND—SCHOOL SECTION—ACT OF MARCH 28, 1908.

Possession and improvement of a tract of unsurveyed land under the act of March 28, 1908, prior to and at the time of survey, by one who at the date of identification of the land by survey was disqualified to make desert entry thereof, does not except the tract from the school grant to the State.

VOGELSANG, *First Assistant Secretary*:

This is an appeal by Cornelius Y. Hamilton from a decision of the Commissioner of the General Land Office dated March 4, 1916, rejecting his application 027110, filed August 11, 1915, at Los Angeles, California, to make second desert entry for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 36, T. 5 S., R. 6 E., S. B. M., under the provisions of section 1 of the act of March 28, 1908 (35 Stat., 52), and the act of September 5, 1914 (38 Stat., 712).

Hamilton alleges that he went into possession of the land in October, 1911, while it was still unsurveyed; under the provisions of section 1 of the act of March 28, 1908, *supra*. His affidavit then further alleges—

That he has constructed a wire fence around said land, said fence consisting of a strong one-strand barbed-wire fence, the posts being the hard mesquite logs, which affiant has cut from the land involved herein.

That he erected a house about 10 x 14 ft., with corrugated iron roof, which house is to be used for keeping farming tools and implements.

That he has cleared and leveled two acres of land, and planted same to barley.

That he has been working on this land and held peaceable possession thereof, since October, 1911, and claims by virtue of the act of March 28, 1908, *supra*, and the decision of the U. S. Supreme Court in *Mining Co. v. Consolidated M. Co.*, 102 U. S., 167-175, the preference right of entry to said land.

It should be noted that the affidavit is indefinite as to the exact time when the improvements claimed by him were constructed. The land was surveyed in the field January 12th to March 15, 1912, the plat being approved May 14, 1914, and filed in the local land office April 1, 1915.

November 9, 1911, Hamilton made desert-land entry 014218 for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 6, T. 6 S., R. 7 E., S. B. M. A contest was filed against this entry November 15, 1912, by James W. Green, charging failure to do the annual work. An answer was filed by Hamilton, the hearing being held February 13, 1913. By decision of May 9, 1913, the register and receiver recommended that the contest be sustained. Hamilton appealed therefrom and their action was sustained by the Commissioner in a decision dated November 13, 1913, the entry being canceled January 26, 1914.

The Commissioner rejected Hamilton's present application upon the ground that the land is part of the grant to the State of California in aid of common schools.

The act of March 28, 1908, *supra*, provides in section 1—

That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

The act of September 5, 1914, provides that any person who has lost, forfeited or abandoned a desert entry, through no fault of his own "shall be entitled to the benefits of the * * * desert land laws as though such former entry or entries had never been made." Upon the record presented therefore, Hamilton was a qualified desert-land entryman when he went into possession of the tract. Upon November 9, 1911, however, he made desert entry for another and noncontiguous tract. He defended the contest against this entry and apparently asserted his right thereto until its cancellation by the Commissioner. At the time of the survey in the field therefore Hamilton was not "qualified to make entry of desert lands" as provided in the act of March 28, 1908, *supra*. The case is analogous to that of settlers upon unsurveyed school lands in which the De-

partment has repeatedly held that a settlement initiated after the identification upon the ground, by means of survey, as school land, although prior to the approval of the survey and filing of the plat in the local land office, is inferior to the right of the State under its grant. The situation, therefore, is the same as if Hamilton had initiated his possessory right after the identification of the land as part of the State school land grant.

The foregoing renders unnecessary the consideration of any other question suggested in this case.

The decision of the Commissioner is accordingly affirmed.

W. S. BURCH.

Instructions, September 12, 1916.

RIGHT OF WAY—INDIAN ALLOTMENT—PATENT.

A fee patent issued on an Indian allotment should include and describe the legal subdivisions covered by the allotment, inclusive of areas covered by approved railroad rights of way under the act of March 2, 1899, with the usual clause that the conveyance is subject to such rights of way.

VOGELSANG, *First Assistant Secretary:*

July 27, 1916, the Commissioner of the General Land Office submitted with request for instructions the question whether in the issuance of a fee patent to W. S. Burch, the purchaser of the allotment of Hiram Brown, a noncompetent Shoshone allottee No. 242, including the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 34, T. 1 N., R. 4 E., W. R. M., Wyoming, the land covered by approved railroad rights of way should be excluded from the patent or whether such patent should be issued merely subject to the rights of way of the railroad companies.

It appears that the sale of the land to Burch was approved by the Department on March 17, 1914. The purchase price having been fully paid and a fee patent requested by the purchaser, on May 29, 1916, the Commissioner of the General Land Office was directed to issue such a patent for the subdivisions above described "containing 76.37 acres," the patent to carry a clause reserving a right of way for ditches and canals constructed by authority of the United States.

The above allotment was made pursuant to the general allotment act of February 8, 1887 (24 Stat., 388), and was approved by the Department June 4, 1906. The Land Office records show that both of the above subdivisions are affected by the right of way of the Wyoming State Railway Company, application for which under the act of March 2, 1899 (30 Stat., 990), was approved by the Department September 16, 1904. The NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said Sec. 34 is

also crossed by the right of way of the Wyoming and Northwestern Railroad Company, application for which was approved July 28, 1905, under the same act. As the Department is advised the Wyoming and Northwestern Railroad Company actually constructed its line of road across the land. The road of the Wyoming State Railway Company appears not to have been built.

The Commissioner states that he is informally advised by the Indian Office to the effect that the purchaser did not pay for the land covered by the right of way of the Wyoming and Northwestern company, and further that such area should be excluded from the patent to be issued.

The act of March 2, 1899, *supra*, provides for the acquirement of rights of way for railroads through Indian reservations, Indian lands, and Indian allotments, and prescribes that upon the conditions therein contained "a right of way for a railroad . . . is hereby granted." Section 2 states that such right of way shall not exceed 50 feet in width on each side of the center line of the road except under certain conditions. In section 3 it is provided that—

Before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands.

Section 4 declares that in the event of failure to construct one-tenth of the line in one year, or to complete the road within three years after approval of the map—

the right of way hereby granted shall be deemed forfeited and abandoned *ipso facto* as to that portion of the road not then constructed and in operation.

It is provided that the Secretary, when he deems proper, may make extension for a period not exceeding two years of time for completion of any road a part of which has been built.

The Commissioner suggests that as both companies were required by the act to make compensation for the respective rights of way, no good reason would appear for the exclusion of the area of one of the roads and not the other. The Department has held that the forfeiture features of section 4, *supra*, are not self-executing but require an ascertainment of the facts and the declaration of the forfeiture. (Spokane and British Columbia Railway Company, 39 L. D., 44.) Although the road may not have been constructed, the right of way granted the Wyoming State Railway Company is still outstanding according to the records of the land department.

It has been the general practice of this Department to issue patents for lands crossed by rights of way subject to the right of occupancy and user by railroad companies of their approved rights of way and

station grounds. The case of Eugene McCarthy (14 L. D., 105), involved a conflict of 2.72 acres between station grounds and a placer entry. The Department in concluding its opinion said:

The mineral claimant must therefore take the land in dispute (2.72 acres) subject to the right of occupation by said company for station purposes. It was held in *Dakota Central Railroad Company v. Downey* (8 L. D., 115, 120), that any patent granted "which should include a portion of this grant to the railroad company, must therefore be subject to that grant, because the grant is already perfect and complete."

Patent may issue to said McCarthy therefore for said placer claim, but subject, as to that part in conflict, to the right of occupation by said company for station purposes.

In the case of Pensacola and Louisville Railroad Company (19 L. D., 386), it was held that the land over which a right of way is located may be disposed of by patent to others, subject to whatever rights the company may have in the same. This view was reiterated in the case of *Brucker v. Buschmann* (21 L. D., 114). The same principle was applied to a toll road the grant of a right of way for which arose pursuant to section 2477, Revised Statutes, which provides that "the right of way for the construction of highways over public lands, not reserved for public use, is hereby granted." See *Wason Toll Road Company v. Townsite of Creede* (21 L. D., 351).

A right of way under the act of March 3, 1875 (18 Stat., 482), was involved in the case of *Mary G. Arnett* (20 L. D., 131), and the Department there said:

The right of way clause should not then be inserted in the applicant's final certificate, unless it is necessary to protect whatever rights the railway company may have in the land by virtue of its grant.

Under the act of March 3, 1875, *supra*, such protection does not appear to be necessary. The act itself affords ample protection to the company, if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is, "and thereafter all such lands over which such rights of way shall pass, shall be disposed of, subject to such right of way." These lands are then disposed of, subject to such right of way, by virtue of the statute.

This is not a direction to the land department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad companies as may have complied with the law. The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act.

In this regard, the case at bar may be distinguished from the recent case of the *Pensacola and Louisville R. R. Co.* (19 L. D., 386). In that case, the granting act did not impose a penalty of forfeiture on the company for failure to perform its conditions, nor did it direct that the lands over which the right of way was granted should be disposed of, subject to such right of way.

See also *Florida Central and Peninsular R. R. Co. v. Bell et al.* (22 L. D., 451).

This doctrine has been applied and followed in later cases. See *Dunlap v. Shingle Springs and Placerville R. R. Co.* (23 L. D., 67); also circular of November 27, 1896 (23 L. D., 458).

In the case of the Southern Ute Allotments (26 L. D., 77), in an opinion prepared by Assistant Attorney-General Van Devanter, it was held that fee patents should contain a clause setting forth that the conveyance was made subject to the railroad's right of way, the grant being under the special act of June 8, 1872 (17 Stat., 339), which did not in terms protect the rights of the company.

In the case of the Oregon Short Line Ry. Co. *v.* Harkness (27 L. D., 430), a right of way across the Fort Hall Indian Reservation, for which \$6,000 had been paid, was involved, and such right-of-way land was embraced in the homestead entry of Harkness. It was there held that a reservation of a right of way should be incorporated in the final certificate and patent, where the right of way was obtained under a special act, but that no such reservation was required in the case of a right of way obtained under the act of March 3, 1875. In the case of *Denver and Rio Grande R. R. Co. v. Clack* (29 L. D., 478) it was again held that a reservation of a right of way granted under the act of March 3, 1875, in final certificate and patent, was not necessary and should not be inserted.

In instructions of November 3, 1909 (38 L. D., 284), as amended January 19, 1910 (38 L. D., 399), the practice as indicated and the distinction between rights of way under general and special acts was preserved and reannounced. It will be borne in mind that the excepting or reservation clause involved was not an exclusion or elimination of an area of land but was a clause stating that the patent or conveyance was subject to the right of way of the specific company under the particular special act. The above-mentioned regulations are cited and explained in the instructions of February 2, 1912 (40 L. D., 398), and it was there said:

Applicants to enter public lands that are affected by a mere pending application for right of way should be *verbally* informed thereof and given all necessary information as to the character and extent of the project embraced by the right-of-way application; and, further, that they must take the land subject to whatever right may have attached thereto under the right-of-way application, and at the full area of the subdivisions entered, irrespective of the questions of priority or damages, these being questions for the courts to determine.

In the case of the Schirm-Carey and other placers (37 L. D., 371, 374), the grant of the Atlantic and Pacific Railroad Company was involved. The 200-foot right of way, covering about 107.33 acres, crossed the affected locations and had been excluded from the patent proceedings and the entry. The Department said:

The difficulties and perplexities involved in the various aspects of the case, in view of the practice with respect to the disposition of lands in a similar situation under other public land laws, as well as the serious question involved

in the bisection of the claim by reason of the exclusion of the railroad right of way, is deemed by the Department to justify the conclusion reached by your office, that in no event can the entry as to any of the claims be passed to patent in the absence of supplemental patent proceedings including the previously excluded area constituting the railroad right of way.

In instructions of March 13, 1911 (39 L. D., 565), involving the Northern Pacific right of way across the tribal lands of the Fond du Lac Indian Reservation in Minnesota, where the company had paid \$10 per acre for the area of its right of way, it was said:

While the right of way granted the Northern Pacific Railway Company by the act of 1864 is a grant in fee, it is not a fee simple but is subject to reversion in the event that the company should cease to use the land for railroad purposes. It is not the rule of the Department to except from patents issued to entrymen under the public land laws the area embraced in the right of way across the lands entered; nor has it been the practice to relieve purchasers under the public land laws from paying for the full area of the tract purchased, notwithstanding that such purchase is made subject to the company's right of way.

To except from a patent the tract of land included in the right of way would be to reserve a narrow strip of land which, if abandoned by the railroad company, would revert to the Government and would not inure to the benefit of the purchaser of the subdivisions traversed by such right of way.

It is believed that damages paid by the railway company in this case were merely damages resulting from the construction of the railroad across the reservation and in no sense represented a purchase of the land covered by the right of way. As above indicated, therefore, I must decline to approve the letter prepared by your office.

Under departmental order of August 23, 1912, and instructions of October 11, 1912, thereunder, all outstanding permits, rights of way, or easements were required to be noted on the face of patents. This order with respect to notations was recalled and vacated by the regulations approved April 14, 1915 (44 L. D., 6)—

excepting such restrictions as may be proper under the policies enunciated in 23 L. D., 67, and 458, which had been adhered to up to the time of the issuance of the order of August 23, 1912.

It has been held that the grants of railroad rights of way in Oklahoma across Indian lands carried no authority to remove oil or natural gas from the right of way area. Missouri, Kansas and Texas Railway Company (33 L. D., 470; 34 L. D., 504).

With reference to lands to be sold and conveyed to railroad companies for reservoirs, ballast pits and tree planting in Indian reservations or allotments pursuant to the acts of March 3, 1909 (35 Stat., 781), and May 6, 1910 (36 Stat., 349), the Department on February 1, 1916 (45 L. D., 177), gave directions to the Commissioner of the General Land Office that patents should be issued for such lands and said:

Such patents, however, to contain the condition that the grant is made solely for the purpose of the use of the land as specified in the company's application;

and that upon the abandonment of said use, the land shall revert to the United States, or its grantee. Entries under the public land laws, and patents issued thereon, should be noted as subject to the rights of the railway company under its application and patent; and similar notation should be made in the case of trust and fee patent upon Indian allotments.

Considerable research has disclosed to the Department but two instances in which the acreage in a right of way has been ordered deducted from the legal subdivision affected and the land patented exclusive of such right of way. One of these cases is that of the Northern Pacific right of way and station grounds within the Flathead Indian Reservation. By the act of July 4, 1884 (23 Stat., 89), \$16,000 was appropriated by Congress to pay the Indians for the surrender and relinquishment to some 1,300 acres included in the right of way and 130 acres covered by station grounds pursuant to the agreement of September 2, 1882, between the Government and the Indians respecting such a cession. The railroad company paid into the Treasury said sum of \$16,000 prior to the act. In a letter prepared in the General Land Office and approved by this Department, on April 25, 1910, it was stated that as the right of way strip and the station grounds had been relinquished prior thereto such lands were not subject to disposal under the acts of April 23, 1904 (33 Stat., 302), and May 29, 1908 (35 Stat., 448), providing for the disposition of the Flathead lands. The opinion was there expressed that title to none of such railroad lands should be disposed of to the homestead settlers and that in original applications and patent certificates there should be excluded the acreage covered by the right of way and the station grounds. The conclusion thus reached would appear to be directly contrary to the doctrine announced in the prior cases of the Oregon Short Line *v.* Harkness, and the Southern Ute allotments, *supra*, and also to the subsequent Fond du Lac Reservation case above cited.

The other instance of exclusion arose in connection with the case of George F. Wunsch (43 L. D., 551). It was there held that the 180-foot strip reserved and withdrawn under the act of June 25, 1910 (36 Stat., 847), for an electrical transmission line should be excepted and excluded in the entry papers and in the patent. Proper regulations under this decision were promulgated November 23, 1915 (44 L. D., 412).

The Department has held that in final certificates and patents for forest homestead lands which have been listed out of the forest and are crossed by Government telephone lines there should be incorporated a clause excepting the telephone line and all appurtenances, but in this connection no specific area of land is excluded. See instructions (44 L. D., 359). By later instructions (44 L. D., 513), this exception has been broadened so as to cover Government roads,

trails, bridges, fire lanes, cabins, fences and other necessary improvements.

The Department is not unaware that the United States Supreme Court has declared that the estate of a railroad company in its right of way is a base, limited or qualified fee. In the case of *Northern Pacific Railway Company v. Townsend* (190 U. S., 267, 270), the court indicated that the filing of the map of definite location and construction of the road prior to homestead entry took the land forming the right of way out of the category of public lands subject to preemption and sale and that the land department was thereafter without authority to convey rights therein. Again in *Stalker v. Oregon Short Line* (225 U. S., 142, 153, 154), it is stated:

When the plat of station grounds was approved by the Land Department, the grounds so selected were segregated from the public lands, and it was the duty of the land department to withdraw all lands so granted from the market. * * * We therefore conclude that the subsequent issue of a patent to the land entered by Reed was subject to the rights of the railroad company theretofore acquired by approval of its station ground map. The patent is not an adjudication concluding the paramount right of the company, but in so far as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title.

In the case of *E. A. Crandall* (43 L. D., 556) it was held that the entry and patent of a legal subdivision crossed by the Northern Pacific right of way carried no interest or title to the right-of-way strip, and that upon the abandonment of the right of way title reverted to the United States and did not pass to the owners of the subdivision through which the right of way ran. It was concluded that such a matter was capable of solution only at the hands of Congress as under existing law as defined by the Supreme Court, the land department had no jurisdiction over lands within such an abandoned railroad right of way.

In connection with this case and as indicating the view Congress would probably entertain, reference is had to section 2 of the act of June 24, 1912 (37 Stat., 138), with respect to the Union Pacific right of way. That act provided that adverse possession should have the same effect—

as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way.

Sec. 2. That any part of the right of way heretofore mentioned which has been, under the law applicable to that subject, abandoned as a right of way is hereby granted to the owner of the land abutting thereon.

The supreme Court in *Railroad Company v. Baldwin* (103 U. S., 426, 430), said:

We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road.

In *Smith v. Townsend* (148 U. S., 490, 499), is found the following:

Doubtless, whoever obtained title from the Government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company; and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and full title to that right of way would vest in the patentee of the land.

This opinion was expressed in connection with the right of way through Indian land in Oklahoma arising under the act of July 4, 1884 (23 Stat., 73).

In the very recent case of *Rio Grande Western Railway Company v. Stringham*, decided November 1, 1915 [239 U. S., 44], a conflict between the right of way under the act of March 3, 1875, and a placer patent was involved. The opinion was prepared by Justice Van Devanter, who was thoroughly familiar with the practice of the land department and who approved the conclusions reached in the *Southern Ute Allotment*, *Oregon Short Line v. Harkness*, and *Denver and Rio Grande Company v. Clack* cases before cited. The following are certain excerpts therefrom:

At the trial the facts were specially found and judgment for the defendants was entered upon the findings. In reviewing that judgment the Supreme Court of the State, accepting the findings below, held that the plaintiffs in virtue of proceedings had in the Land Department under the Right-of-Way Act while the land was yet public acquired a right of way two hundred feet wide through the lands afterwards embraced in the mining claim and that the defendants' title under the placer patent was subject to this right of way, and thereupon reversed the judgment and remanded the case with a direction to "enter a judgment awarding to the plaintiff title to a right of way over the lands in question one hundred feet wide on each side of the center of the track," 38 Utah, 113. Acting upon this direction the trial court vacated its prior judgment and entered another adjudging the plaintiff to be "the owner of a right of way" through the mining claim one hundred feet wide on each side of the center line of the railroad, declaring the plaintiff's title to such right of way good and valid, and enjoining the defendants from asserting any claim whatever to the premises, or any part thereof, adverse to the plaintiff's "said right of way."

* * * * *

The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. *New Mexico v. United States Trust Co.*, 172 U. S. 171, 183; *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 271; *United States v. Michigan*, 190 U. S. 379, 398; *West. Un. Tel. Co. v. Pennsylvania R. R.*, 195 U. S. 540, 570. The judgment under review does not in words so characterize the plaintiff's right nor was it essential that it should do so. It describes the right in the exact terms of the Right-of-Way Act and evidently uses those terms with the same meaning they have in the act. So interpreting the judgment, as plainly must be done, we think it accords to the plaintiff all to which it is entitled under the act.

A homestead patent in conflict with the railroad right of way under the act of March 3, 1875, was involved in *Barlow v. Northern Pacific Ry. Co.* (240 U. S., 484). The court there treats the prior rights of the railroad company as being "paramount" and concludes that the homestead patent under the facts as found was subject to the right of way.

In view of the foregoing and of the well-established and long-continued practice of the land department with respect to the issuance of patents for lands crossed by prior rights of way, it is directed that the fee patent to be issued to W. S. Burch includes and describe the legal subdivisions covered by the Indian allotment inclusive of the right of way areas and further that usual clause indicating that the conveyance is subject to the two approved rights of way mentioned be inserted.

SAMUEL D. BLOCK.

Decided September 19, 1916.

DESERT LAND ENTRY—WATER SUPPLY—DECIDUOUS FRUITS.

Where land is adapted solely to the production of deciduous fruits, such fruits may be considered "ordinary agricultural crops" within the meaning of the desert land law; and a showing by a desert land entryman that he has an adequate water supply to successfully irrigate and cultivate his land for the production of deciduous fruits, is sufficient to meet the requirements of the law.

VOGELSANG, *First Assistant Secretary*:

Samuel D. Block has appealed from the decision of the Commissioner of the General Land Office of April 12, 1916, in the above-entitled case, rejecting the final proof submitted April 21, 1915, in support of his desert-land entry 018167, made March 20, 1913, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, T. 5 N., R. 3 W., S. B. M., Los Angeles, California.

It appears that Adelaide S. Kibbey made desert-land entry 02950 for the W. $\frac{1}{2}$ of said section, containing 320 acres, but on submitting final proof it was discovered from her own statements that she had made a former entry and was therefore not qualified to make entry for the full acreage, reducing her entry to 160 acres. The part that she relinquished is the same land that Samuel D. Block made desert-land entry of, as above noted.

Block was required to furnish a showing as to the *bona fides* of the transaction between him and Kibbey, wherein it is alleged that he had paid to Kibbey \$2,000 for the use of a well located on Kibbey's land, which had been already patented to her. This well was located on the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section 28, and is 363 feet deep, has 10-

inch casing, equipped with a Layne and Bower centrifugal pump, having a maximum capacity of 450 gallons per minute, and a 35 horsepower Western gas engine.

Block was also advised that he might relinquish the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of said section 28, whereupon patent would be issued for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said section 28, if the showing in regard to the transfer of the water supply is satisfactory.

Block was further advised that if he was unable to procure an additional water supply and does not desire to relinquish all of his entry except the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, he may, if qualified, apply for relief under the last two paragraphs of section 5 of the act of March 4, 1915 (38 Stat., 1161). He was further advised that if, in his opinion, his alleged water supply is sufficient for the irrigation of more than 80 acres planted to ordinary agricultural crops, he may file an affirmative showing, in duplicate, refuting the conclusions reached by the Commissioner, and apply for a hearing, at which all the matters with reference to the water supply may be inquired into. It is contended that injustice has been done Block by the action of the Commissioner.

With the appeal is filed a sworn statement by Block, to the effect that on the 10th day of April, 1915, he entered into an agreement with Adelaide S. Kibbey, by which he bought from her a three-fifths interest in the well and pumping plant located on the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28; that while the agreement mentioned \$10 as the consideration, as is usually customary in California, the true consideration was \$2,000; that on the 10th day of April, 1915, he made and delivered to Miss Kibbey his check for said \$2,000 (a copy of this check is presented in his affidavit); that the check was indorsed by Miss Kibbey and on the 17th day of April, 1915, was paid to her by the bank; that he purchased said interest for a cash consideration and there was no agreement of any kind that he should at any time retransfer to Miss Kibbey, or to any other person, the whole or any part of his interest in the well and pumping plant so conveyed to him by the agreement; that the interest mentioned in the agreement as passing to him was conveyed to him free from any conditions or reversions of any kind; and that he now has the full, free, and unlimited title to such interest and is absolute owner thereof in fee, free and released of and from any and all claims, right, title, and interest of Miss Kibbey or any other person.

Miss Kibbey made an affidavit to substantially the same effect, wherein she stated that Mr. Block, the entryman, had given her a check for \$2,000 for the well, pump, etc.; that she presented the check to the bank and received the money for it. It appears that the well and right of way from the well to Block's land was conveyed in a deed which was duly recorded.

With the appeal is a statement made by Roy G. Meade, mineral examiner of the General Land Office, wherein he stated that he made an investigation of the entry on November 8, 1915, for the purpose of determining the sufficiency of the water supply and whether or not the required area had been reclaimed. The agent stated that the land in question is situated in what is locally known as Apple Valley, about 8 miles southeast of Victorville; that the elevation is approximately 2,300 feet. The soil is very sandy and crops can not be grown without artificial irrigation. The agent states that the water for the irrigation of the land was obtained from a well located on the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28, and embraced in the entry of Miss Kibbey; that there is a 10-inch well 365 feet deep, in which the water stands at a depth of 150 feet; that the well penetrates an underlying water-bearing gravel and will yield about 55 miner's inches of water; that the well is equipped with a 35 horsepower Western engine and a Layne and Bowler 8-inch deep-well pump; that the plant has a capacity of 53 miner's inches; that a ditch leads from the well east to the southeast corner of the land embraced in the entry, thence north along the east line to the north line; that another ditch leads north along the west line for a distance of about one-half mile; that by means of these two ditches water can be conveyed over the entire area embraced in the entry; that the W. $\frac{1}{4}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ has been cleared, leveled, and planted to apple trees; that the trees were about two years old when the agent examined the land, and were in a healthy condition.

The agent further states that there are several hundred acres of land in that vicinity which have been planted to orchard, while no land has been reclaimed or planted for the purpose of raising ordinary crops; that upon investigation in the locality, the agent was of opinion that where the depth of water is in excess of 100 feet, the land will all be planted to trees and that no land will be reclaimed for any other purposes; that it was his opinion that the duty of water should be considered on that basis and not on the basis that ordinary crops could be grown. The agent concludes his report as follows:

In view of the fact that sufficient water has been obtained for the reclamation of the entire area if the land is planted to fruit trees, substantial ditches constructed so that water can be conveyed over the entire irrigable area, and one-eighth of the land reclaimed, it is recommended that desert-land entry 018167 be approved for patent, if valid in other respects.

A statement is filed in the record by F. A. Fletcher, horticultural inspector for the State, wherein he states that—

Under the condition you describe, hay and grain crops are not practicable and could not be successfully and profitably grown; . . . aside from the River Mesa this entire section, where cultivation of any kind is practicable, is only

adapted to fruit trees and poultry raising. Deciduous fruit trees should be the crop basis at the present time and under existing conditions.

Claimant makes affidavit, which is filed in support of his appeal, stating that since making final proof he has improved the pumping plant, and by actual test the pumping plant is capable of producing and has produced 53.28 miner's inches of water; that the pump is placed at a depth of 160 feet from the surface, to which water stands at a depth of 130 feet from the surface; that by pumping said well with the pumping plant he has now, he has not been able to ascertain any appreciable lowering of the water in the well; that this would indicate that the water supply is much greater than the amount actually pumped with the present pumping plant. He further stated that at the time he made the entry it was his intention to plant said land to deciduous fruit and not grain; that he planted 20 acres to fruit trees and the same are now growing and in a flourishing condition; that the condition of the well is such that the three-fifths interest in the water supply owned by him is sufficient to irrigate the entire 160 acres when planted to fruit trees; that the depth of the water being 130 feet makes it impracticable and unprofitable to attempt to grow anything other than fruit on this land.

Section 4 of the act of March 3, 1891 (26 Stat., 1095), amending the act of March 3, 1877 (19 Stat., 377), provides that at the time of filing the declaration required, the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of water to be used for irrigation.

Where it is shown, as in this case, that deciduous fruits are the only kind of crop that may be produced, cultivation of such trees is sufficient to meet the requirements of the law, for such crops may be considered as ordinary agricultural crops.

From the showing made in this case, the Department is of opinion that the claimant has shown that he has expended much more than the required amount in works of reclamation. It is clearly shown that he paid Miss Kibbey \$2,000 for the three-fifths interest in the well, and that he has a right of way from Miss Kibbey, shown by regular deed of transfer, duly recorded, to carry this water to the land; that ditches have been dug from the well to the land, and 20 acres thereof have actually been planted to the fruit crop. The Department is of opinion that there is sufficient water in the well to thoroughly irrigate the whole tract, 160 acres. He is not required at this time to show cultivation of all of the land, but he has shown that one-eighth of it has been reclaimed in the manner stated.

In view of the above considerations, the action appealed from is reversed.

**INTERNAL-REVENUE STAMPS ON CERTIFIED COPIES NO
LONGER REQUIRED.**

CIRCULAR.

[No. 503.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 22, 1916.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: The act of October 22, 1914 (38 Stat., 745), as extended on December 17, 1915, by Public Resolution No. 2 (39 Stat., 2), was repealed, except as to sections 3 and 4 thereof, by the act of September 8, 1916 (39 Stat., 756).

Accordingly, no internal-revenue stamps are hereafter required on certified copies of declarations of intention to become a citizen, of certificates of naturalization, or of other records.

However, all such copies issued by a proper officer between the dates of December 1, 1914, and September 8, 1916, inclusive, even though not filed until after the latter date, must have affixed thereto and canceled the documentary stamp required by said act of October 22, 1914.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

COST OF CERTIFIED COPIES OF RECORDS AND PAPERS.

CIRCULAR.

[No. 504.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 22, 1916.

1. The act of October 22, 1914 (38 Stat., 745), having been repealed (except as to secs. 3 and 4 thereof) by the act of September 8, 1916 (Public, No. 271), the schedule of fees for the preparation

and delivery of certified copies of records and papers set forth in Circular No. 456 (44 L. D., 530), is amended to read as follows:

- (a) For written copies, 15 cents for each 100 words.
- (b) For photographic copies, 15 cents for each sheet not exceeding 11½ by 15 inches; for larger sizes a proportionate cost, not to exceed 40 cents per sheet.
- (c) For photolithographic copies of township plats, 25 cents each.
- (d) For tracings or blue prints, a sum equal to the cost of preparing the same.
- (e) For certifying a copy and affixing thereto the seal of the officer certifying, 25 cents.
- (f) For each certified copy of any printed order or regulation intended for gratuitous distribution, 25 cents.

2. The cost of a certified photographic copy of a patent is ordinarily 40 cents and of a typewritten copy 85 cents.

3. A separate certificate and seal must be attached to each certified copy of a patent, as well as to each certified copy of a township plat; but where there have been two or more surveys of a township and a copy of each plat of survey is desired, all of such related plats may be certified under one certificate and seal.

4. All fees for certified copies must be paid in advance. In any case where the amount remitted is insufficient, the remitter will be promptly advised concerning the deficiency.

5. Remittances may be effected by means of New York exchange, certified check, cashier's check, or post-office money order, and should be made payable to the Commissioner of the General Land Office.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

ENTRIES FOR LAND IN MORE THAN ONE DISTRICT.

CIRCULAR.

[No. 505.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 22, 1916.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: Persons desiring to make and perfect entries of land lying partly within one land district and partly within another will be governed by the following rules:

1. Complete applications must be filed in each office, together with the usual fee and commissions payable for the land in each land district, besides any other payment required by law. Each application should contain a proper reference to the other application.

2. In submitting proof, the two entries should be treated as one, and the published notice of intention should describe all the land and specify in which land district each part of the claim is located. The notice must be posted in each office, a copy thereof being forwarded to the other office by the office issuing the notice. If the notice is published and posted correctly and the proof is satisfactory, the register who issued the notice for publication will issue final certificate for the portion within his land district on payment of the testimony fees and payment of the commissions and (if required) the purchase money due for the land in his district. He will then advise the officers of the district wherein the remainder of the claim is located, who will, on receipt of the final commissions and purchase money (if any) due for the part in their district, issue final certificate for that portion without further proof.

3. Should a proof be rejected by the office from which the notice of intention is issued, the other office should be so advised, but the appeal or further showing must be filed in the office which rejected the proof.

4. When a desert-land entry embraces land in more than one district, the required annual proofs may be filed in either district, provided proper reference is made to the portion of the entry in the adjoining district, and the entryman must notify such officers by letter of the date when the annual proof is filed.

5. In applying for patent to a mining claim embracing land lying partly within one land district and partly within another, the proceedings in each office shall be conducted in all respects in conformity with law. A full set of papers must be filed in each office, except that one abstract of title and one proof of patent expenditures will be sufficient. Notice of application for patent should be posted in each office and remain posted for the period required by law. However, only one newspaper publication and one posting on the claim will be required, but proof thereof must be filed in both offices, the affidavits as to posting plat and notice on the claim to be sworn to within the respective land districts, as well, also, as all of the other affidavits required in mineral patent proceedings, except such as, under the law, may be sworn to outside of the land district wherein the land applied for is situated. Publication, payment of fees, and the purchase price of the land and posting in office will be further governed by the provisions of rule 2 hereof.

6. Rules 1 and 2 hereof are applicable to timber and stone entries, except that on such entries no commissions are collected.

7. Applications for public offerings under section 2455, Revised Statutes, can not be considered unless all the land lies in one land district.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

**MILITARY SERVICES DURING OPERATIONS IN MEXICO, OR
ALONG THE BORDER—PUBLIC RESOLUTION NO. 32, OF AUGUST
29, 1916.**

CIRCULAR.

[No. 506.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 27, 1916.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Public Resolution No. 32, approved August 29, 1916, provides:

That the provisions of the act approved June 16, 1898, chapter 458 (30 Stat., 473), shall be applicable in all cases of military service rendered in connection with operations in Mexico, or along the borders thereof, or in mobilization camps elsewhere, whether such service be in the military or naval organization of the United States or the National Guard of the several States now or hereafter in the service of the United States.

Said act of June 16, 1898, provides:

That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine during the existing war with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: *Provided*, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: *Provided further*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

2. No application hereafter filed to contest a homestead entry on the ground of abandonment will be allowed by you unless there is an allegation therein that the entryman's alleged absence from the land was not due to his employment in military service rendered in connection with operations in Mexico, or along the borders thereof, or in mobilization camps elsewhere, in the military or naval organization of the United States or the National Guard of any of the several States.

3. No allegation of abandonment will be sustained against a homestead settler in connection with a contest initiated after August 29, 1916, unless it be proved at the hearing, if one be had, that the entryman's alleged absence from the land was not due to his employment in military service as indicated.

4. No instructions will be issued at this time on any other provision of the resolution.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:

Bo SWEENEY,

Acting Secretary.

COLVILLE INDIAN LANDS—APPLICATIONS.

REGULATIONS.

WASHINGTON, *October 7, 1916.*

REGISTERS AND RECEIVERS,

Spokane and Waterville, Washington.

SIRS: Under the provisions of paragraph 9 of the President's proclamation of May 3, 1916, non-mineral, unallotted, and unreserved lands within the former Colville Indian Reservation, Washington, classified as grazing lands or irrigable lands, not entered by persons assigned numbers under said proclamation, will, at 9 o'clock a. m. on October 18, 1916, become subject to settlement and entry under the general provisions of the homestead laws and the act of Congress approved March 22, 1906 (34 Stat., 80).

Paragraph 10 of the proclamation authorizes the Secretary of the Interior to make and prescribe such rules and regulations as may be necessary and proper to carry out the provisions of the proclamation and of the said act of Congress into full force and effect.

In order that conflicting claims of persons settling on the lands and those presenting applications at the land office may be adjusted without confusion it is directed that applications for the lands may be filed at the land office commencing at 9 o'clock a. m. on October 14, 1916, and that all such applications presented on or before

October 17, 1916, and all applications filed by persons present at the land office at 9 o'clock a. m. on October 18, 1916, if in proper form and accompanied by the required payments, shall be treated as simultaneous and given preference over claims to the lands initiated by settlement. The simultaneous applications will be disposed of as follows:

1. Applications which do not conflict will be allowed.

2. You will hold a drawing at your respective offices on October 18th to determine the order in which the conflicting applications will be taken up for consideration. The names of the applicants will be written on cards which will be placed in separate envelopes upon which there are no distinctive or identifying marks. The envelopes will be thoroughly and impartially mixed and then drawn one at a time by some disinterested person. As the envelopes are drawn the cards will be removed and numbered, beginning with number one, and fastened to the proper applications.

If it is found that an application cannot be allowed for any part of the land applied for it will be rejected. If it may be allowed for part but not for all the land applied for applicant will be allowed 30 days from receipt of notice within which to advise you whether to allow the application as to the land not in conflict or whether to reject it as to all the land applied for.

Moneys tendered with the simultaneous applications will be deposited by the receiver as "Trust Funds (unearned moneys)." If the applications are allowed in whole or in part the moneys affected by the allowance will be deposited to the credit of the Treasurer of the United States as "Sales of Colville Indian Lands—act of March 22, 1906 (34 Stat., 80)." If the applications are rejected in whole or in part the moneys affected by the rejection will be returned to the applicants by the official check of the receiver. If an applicant does not secure all the land applied for he may, if possible, amend his application to embrace other lands, and if he does so the payment theretofore made will be applied on account of the required payment under the amended application. If it is not sufficient, the applicant will be required to pay the deficiency; and if it is more than the sum required, the excess will be returned to him by the official check of the receiver.

Applications not in proper form or not accompanied by the required payments, presented from October 14 to 17, inclusive, or filed by persons present at the land office at 9 o'clock a. m. on October 18, 1916, will be rejected. All applications filed after 9 o'clock a. m. on October 18, 1916, will be received and noted as of the hour of their filing and disposed of in the order in which they were filed after the simultaneous applications have been acted upon and disposed of.

Notice of these instructions should be given by you to the public press as a news item and a copy should be posted in your office for public inspection.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved, October 7, 1916:

Bo SWEENEY,

Assistant Secretary.

RECLAMATION—PAR. 103 OF GENERAL CIRCULAR AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, October 14, 1916.

The SECRETARY OF THE INTERIOR.

SIR: Paragraph 103 of General Reclamation Circular, approved May 18, 1916 [45 L. D., 385], prescribes the action to be taken when it is found that the irrigable area of a tract of land is greater than that covered by the water-right application. The last clause of the form of contract provided therein reads as follows:

the first instalment of the charge for construction or building, operation and maintenance shall become due on the next instalment date after the amendment takes place.

These increased areas are generally small and the matter can be more satisfactorily and economically handled if each instalment on the original area and each instalment on the added area, which are payable on the same date, be made at the same rate of percentage. The total charges against the original area would automatically be extinguished first. The remaining instalments on the added area would then continue at the maximum rate until fully paid.

It is therefore recommended that the form of contract provided in paragraph 103 of General Reclamation Circular be amended by the addition thereto of the following:

Each construction instalment on such added area shall be at the same rate as the original construction instalment payable on the same date, until all the construction charges due or to become due under the original water-right application have been paid in full, subsequent construction instalments on the added area to continue thereafter at the maximum rate until fully paid.

Respectfully,

MORRIS BIEN,
Acting Director.

Recommendation approved, October 17, 1916:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

ABANDONED MILITARY RESERVATIONS IN NEVADA.**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 14, 1916.

REGISTER AND RECEIVER,
Carson City and Elko, Nevada.

SIRS: Your attention is invited to the provisions of the act of August 21, 1916 (39 Stat., 518), which reads as follows:

That all the agricultural lands embraced within the military reservations in the State of Nevada which have been placed under the control of the Secretary of the Interior for disposition be disposed of under the homestead and desert-land laws, and not otherwise: *Provided*, That this act is intended to make applicable to the desert-land laws only such lands as were included under the act of March third, eighteen hundred and seventy-seven, providing for the disposition of public lands under the desert-land laws.

You will observe that the law extends the disposal of lands in abandoned military reservations in the State of Nevada to disposition under the desert-land laws as well as the homestead laws as heretofore provided under the act of October 1, 1890 (26 Stat., 561). In order to be subject to disposal under the desert land laws, the lands must be of the character described under the act of March 3, 1877 (19 Stat., 377).

Very respectfully,

C. M. BRUCE,
Acting Commissioner.

Approved, October 14, 1916:

Bo SWEENEY,
Assistant Secretary.

INDIAN ALLOTMENTS—EXCHANGE—CEDED LANDS.**CIRCULAR.**

[No. 511.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 16, 1916.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: It is provided by the act of March 3, 1909 (35 Stat., 781, 784), that:

If any Indian of a tribe whose surplus lands have been or shall be ceded or opened to disposal has received or shall receive an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the

lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

You were directed by circular of June 14, 1909 (38 L. D., 41), to note on your plats and tract books notices of exchange under said act filed in your office by the officer of the Indian Service having charge of the proposed change.

No general provision for allotting the surface right only having been provided by existing law, ceded lands withdrawn or classified as coal cannot be taken in exchange for tribal allotments, unless such allotments were made under a special act, providing for the issuance of patents with a reservation of the coal in the land to the government.

You will notify any Indian agent who may offer notice of exchange in such a case, that the proposed exchange is not provided for by law, and you will not treat the lands proposed to be taken in exchange as reserved from entry.

On receipt of a proper notice under this act, you will make notation thereof on your plats and tract books in the regular order of its receipt, in relation to other applications for lands, noting on the same the exact time of such filing and place the paper on file in your office, and thereafter allow no appropriation of the lands affected, until advised of the final disposition of the application for change.

As this notice is intended to serve merely the purpose of a caveat to prevent subsequent disposal of the lieu lands, you will give the same no serial number, but will report to this office by special letter the contents of said notice.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved, October 16, 1916:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

ENLARGED HOMESTEAD—IDAHO—ADDITIONAL—ACT SEPTEMBER 5, 1916.

CIRCULAR.

[No. 514.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 30, 1916.

REGISTERS AND RECEIVERS,

United States Land Offices in Idaho.

SIRS: The act of September 5, 1916 (39 Stat., 724), makes effective, as to Idaho, the same provisions as are contained in the act

of July 3, 1916 (39 Stat., 344), adding to the enlarged homestead act of June 17, 1910 (36 Stat., 531), a seventh section, to permit an additional entry for a tract not contiguous to the one originally entered, after submission of proof on the original entry.

Therefore, the circular of instructions of July 8, 1916 (No. 486), issued under the act of July 3, 1916, will be considered hereafter as addressed also to you, paragraph 8 of said circular being hereby revoked.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, October 30, 1916:

Bo SWEENEY,
Assistant Secretary.

SAMUEL D. PULFORD ET AL.

Decided July 12, 1916.

COAL LANDS—CHARACTER OF LAND.

The mere fact that lands contain deposits of coal is not sufficient to warrant their disposition under the coal land laws; but to make them subject to such laws they must contain workable deposits—that is, coal in such quantity and of such quality as would warrant a prudent coal miner or operator in the expenditure and labor incident to the opening and operation of a coal mine or mines on a commercial basis.

CLASSIFICATION OF LANDS AS COAL.

A classification of lands as coal is subject to supervision and review by the Secretary of the Interior.

JONES, *First Assistant Secretary:*

This case involves applications to make coal entry of certain tracts situated in T. 32 S., R. 11 W., W. M., Roseburg, Oregon, land district, as follows:

S. D. Pulford, 02232, SW. $\frac{1}{4}$, Sec. 22.

James H. Flanagan, 02233, NE. $\frac{1}{4}$, Sec. 28.

Cecil C. Carter, 02234, SW. $\frac{1}{4}$, Sec. 28.

Herbert Lockhart, 02235, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32.

Louise C. Lockhart, 02236, SW. $\frac{1}{4}$, Sec. 32.

Alta E. Carter, 02237, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 33.

These applications were presented in 1907. Previously thereto and by the President's proclamation of October 6, 1906, the areas described were, together with other lands, included in the Siskiyou National Forest. It also appears that by order of June 21, 1907, the

entire township was withdrawn from coal entry for examination and classification with respect to coal values, but was restored to entry February 12, 1908.

May 11, 1908, notices of the several applications were issued by the local officers and the applicants were directed to cause the same to be published and posted in conformity with the requirements of the coal land regulations of April 12, 1907. Thereafter, and by letter of May 14, 1908, the Commissioner, acting upon the adverse report of an official of the Forestry Service, directed that proceedings be instituted against each of the applications on the following charges:

1. That the coal vein discovered is not workable and that the land is not coal land.
2. That claimant did not make the application in good faith for a coal claim, but for speculative purposes to dispose of the valuable timber thereon.
3. That the land is chiefly valuable for its timber.

The charges having been denied by each of the claimants, hearings were had, at the conclusion of which it was stipulated that the six cases should be consolidated and treated as one case. Upon consideration of the evidence, the local officers, on November 9, 1908, found that the charges of bad faith had not been sustained as against any of the claimants, but that there was not contained within the limits of any of the claims a workable deposit of coal, and for that reason recommended that each of the applications be rejected. On appeal, this action was, by the Commissioner's decision of August 2, 1909, affirmed, and the applications were, accordingly, held for rejection.

September 11, 1909, the claimants above named filed what was denominated a motion for reconsideration of the Commissioner's decision, and in connection therewith an application for new trial, praying (1) that the evidence in the case of Sterling M. Reeves *et al.*, involving an adjoining area, be considered in this case, and (2) that the claimants be permitted to introduce additional evidence relating to developments after the date of the former hearing.

—By decision of August 25, 1910, the Commissioner adhered to his decision of August 2, 1909. He also denied the request for consideration of the case in the light of the evidence adduced in the case of Sterling M. Reeves *et al.*, for the reason that by decision of August 25, 1910, he had found that the preponderance of such evidence established that no workable deposits of coal existed within the limits of any of the tracts involved therein. He further held that the allegations contained in the affidavits filed by appellants to support the application for new trial were insufficient to warrant a further hearing, and also that certain of the affidavits executed by persons who had testified at the previous hearing on behalf of claimants, were less favorable to the claimants than was their testimony

so given. He accordingly denied the motion for a new trial. From said decisions of August 2, 1909, and August 25, 1910, the claimants appeal.

With respect to the evidence adduced at the hearing already had as to the coal character of the land in question, it is sufficient to say that it clearly supports the concurring findings of the local officers and of the Commissioner to the effect that on none of the tracts embraced within the limits of any of the claims was there at any time actually disclosed or otherwise shown to exist a deposit of workable coal, and that such coal as was found consisted of thin seams interstratified with slate, shale and bone, and, consequently, too high in ash to afford a merchantable product. Indeed the correctness of the findings of the Commissioner and the local officers in this regard was practically conceded on behalf of the claimants, their attorney, who was also one of the claimants, declaring, in a brief filed to support the application for reconsideration of the Commissioner's first decision, that "claimants' showing of the actual coal character of these lands was apparently insufficient—a fact we are loath to admit even yet—but we believe the evidence shows that the claimants believed they were clearly coal lands." The Commissioner's finding as to the character of the land, in so far as such finding is based on the evidence already adduced, is accordingly affirmed.

As to other features of the case, the evidence shows that the area is situated on the northern and eastern slopes of a mountain known as Eden Ridge, whose highest point is about 3,000 feet above sea level and from 1,300 to 2,900 above the bed of the south fork of Couquille River, by which it is on three sides, and in close proximity thereto, bounded. At the time of the hearing it was some 35 miles or more from the nearest railroad and inaccessible to travel therefrom except by trails that could be utilized only by pedestrians and saddle or pack animals.

The evidence on behalf of the Government is to the effect that there is on the tract claimed by Pulford 17,584,400 feet of red fir, 99,600 feet of western hemlock, 109,740 feet of Port Orford cedar—a total of 17,793,740 feet of timber. A witness who testified on behalf of Pulford estimated the amount of timber on this claim at fifteen million feet.

On the tract claimed by Flanagan it is testified by a witness for the Government that there is 18,315,200 feet of timber, consisting almost wholly of red fir. Flanagan himself testifies that at the time he made application for the land he estimated that it contained a growth of about fifteen million feet of timber.

On the claim of Cecil C. Carter it is testified on behalf of the Government that there is 8,004,050 feet of red fir, 48,000 feet of western

hemlock, and 28,500 feet of Port Orford cedar, or a total of 8,080,550 feet of timber. Carter himself, who has been engaged in the logging business eight or ten years, testified that at the time of his application he estimated that the land contained eight million feet of timber and that he sees no reason to question the accuracy of that estimate.

A witness for the Government testified that there is on the claim of Herbert Lockhart, 5,178,830 feet of timber, all but about 96,000 feet of which is red fir, the remainder being western hemlock and Port Orford cedar, and that 90% of this timber is merchantable.

Lockhart testified that he observed before he filed that the tract was heavily timbered.

It is testified on behalf of the Government that on the claim of Louise C. Lockhart there is a growth of 8,249,000 feet of timber, including 1,093,000 feet of Port Orford cedar and 20,700 feet of western hemlock, the remainder being red fir.

On the tract claimed by Alta E. Carter it is testified on behalf of the Government, and not denied, that there is a growth of 8,943,660 feet of merchantable timber, consisting of 799,900 feet of Port Orford cedar and 247,800 feet of timber hemlock, and the remainder red fir.

Two beds containing coal are shown to be exposed within the limits of the area in question. One is denominated the Anderson bed, the outcrop whereof extends in a northeasterly-southwesterly direction through the claims of Cecil C. and Alta E. Carter, Flanagan and Pulford, with a dip at the outcrop of from five to fifteen degrees to the west. This bed is about six feet between walls and underlies in whole or in part all of the six claims of the group. The other bed, which is denominated the Carter bed, is about twelve feet thick and lies about 400 feet stratigraphically above the Anderson bed. This bed is shown to outcrop, either actually or theoretically, on the Herbert Lockhart, Cecil C. Carter and Flanagan claims, and dipping in a westerly direction, underlies approximately one-half of the said Lockhart and Carter claims and about 30 acres of the Flanagan claim. It is stipulated, however, by the claimants at the hearing that this bed possesses no value, the coal seams therein being so thin and so interlaminated with bone and other impurities as to be non-workable.

To support their motion for a new trial the claimants filed a large number of affidavits based upon divers analyses and tests of the Anderson bed, made after the hearing already had. These affidavits are to the effect that in 1909, extensions were made of certain surface openings at various points within the areas in question and that samples of coal were taken therefrom and analyzed.

In 1911 a number of supplemental affidavits were filed.

Pending determination of this case by the Department, and in 1912 and 1913, the Director of the United States Geological Survey, pursuant to departmental instructions, caused a reexamination of the land to be made. The result of such reexamination is published in Geological Survey Bulletin No. 541-I, commencing at page 23. On the basis of this reexamination all the land here in question save that included in the claim of Pulford and a little less than half of that included in the claim of Flanagan, was, by the Commissioner's letter of May 16, 1914, classified as coal land and appraised at the minimum price of \$10 per acre. Respecting the general character and quality of the coal it is, in the bulletin, said:

The coal beds in this field contain material of all grades from clean bituminous coal with ash as low as 10 per cent to bone with 60 per cent ash and carbonaceous shale. The lenses of coal, bony coal, and bone are from a fraction of an inch to several inches in thickness and grade into one another both vertically and horizontally. The gradation from coal through bony coal and bone to carbonaceous shale is in most places almost imperceptible. Although in the graphic sections parts of a bed as much as 3 feet thick are shown as coal, it should be understood that at no place is there so much as 1 foot of coal that does not contain at least a perceptible amount of bone or bony coal. Much of the material can not be accurately classified without a determination of its ash content, and the same portion of the bed may be differently described and classified by different observers. In addition to the difficulty of determining in the field what should be the designation of the different parts of a bed is the difficulty of showing the condition of the bed graphically. For instance, in the middle of the section at location 3 is a layer 1 foot 9 inches thick which is a mixture of carbonaceous shale, bone, and bony coal that can not be differentiated. This has been shown graphically by the symbol of bone superimposed upon that for carbonaceous shale.

So great is the variability of the beds that no two sections of a bed exactly agree, even though measured in the same opening, and the same section measured by different observers may be classified differently.

The analyses illustrate the great variability of these coals from place to place. Sulphur determinations by the Bureau of Mines on 26 samples from all the beds in the field show a minimum of 0.36 per cent, a maximum of 3.51 per cent, and an average of 1.26 per cent. In 25 samples the moisture in the air-dried condition ranged from 2.9 to 7.3 per cent, the average being 4 per cent. In 15 samples of the Anderson bed the ash ranged from 16.3 to 40.2 per cent, the average being 31 per cent. In 9 samples of the Carter bed the ash ranged from 20.6 to 45.9 per cent, the average being 34.5 per cent.

The high ash content in the Anderson and Carter beds, averaging about 30 per cent, is of course a decided detriment, and if not at least partly removable would prohibit their use for domestic fuel or for making steam. It is doubtful whether or not they could be profitably utilized as mined, even in the gas producer. An examination of the Eden Ridge coal beds shows that their high ash content is primarily due to the presence of bone and bony coal occurring in layers between the benches of coal. This bone contains 40 to 50 per cent of ash, and its removal would leave a coal material much lower in ash than the average of the bed as mined. A common method of separating bone from coal and thus improving its quality is washing. Bone and impure coal have a higher specific gravity than coal, and it is this physical fact on which the successful washing depends.

Included in said reports are tables showing the results of chemical and other tests made of samples of coal taken at various points on the Carter and Anderson beds, but the data contained in said tables are clearly and sufficiently summarized in the foregoing excerpts from the report, and therefore need not be here set out.

Suffice it to say that the report shows the coal beds disclosed upon the claims in question to be so variable, the seams of coal therein to be so thin, and the better portions of the beds to carry such a high percentage of ash-producing impurities, as to support the opinion that the deposits can not be successfully mined and placed upon the market in competition with the other coals of the Coos Bay region, wherein the claims are situated. This, in the opinion of the Department, is not overcome by the showing now made on behalf of the claimants as basis for a new trial.

The coal-land laws, contained in sections 2347-2352, inclusive, Revised Statutes, authorize the disposition of vacant coal lands of the United States not otherwise appropriated or reserved and grant a preference right of entry to persons or associations who may have opened and improved "any coal mine or mines upon the public lands." They also authorize the Commissioner of the General Land Office to issue all needful rules and regulations for carrying the provisions of the law into effect. In the regulations approved April 12, 1907, prior to the applications at bar, it was provided that lands sought under the coal-land laws "must contain workable deposits of coal."

Referring to the coal-land laws and the regulations thereunder approved by the Department July 31, 1882 (1 L. D., 687), the United States Circuit Court of Appeals, 8th circuit, speaking through Judge (now Mr. Justice) Van Devanter, in the case of *Ghost v. United States* (168 Fed., 841, 845), said:

And not only did the regulations then in force require an applicant to make proof at the time of actual purchase that the land was "chiefly valuable for coal," but the regulations since adopted call for proof that the lands contain "workable deposits of coal." Regulations 1907, pars. 2, 10, 14, in 35 Land Dec. Dep. Int. 667. Besides, the uniform interpretation of the statute has been that it does not admit of the purchase of public lands as "coal lands" unless they contain coal of such quality and in such quantity as reasonably to warrant the conclusion that it is capable of being profitably mined or worked. *Savage v. Boynton*, 12 Land Dec. Dept. Int., 612; *Rucker v. Knisley*, 14 Id., 113; *Scott v. Sheldon*, 15 Id., 361; *Hamilton v. Anderson*, 19 Id., 168; *Davis v. Tanner*, 20 Id., 220; *McKibben v. Gable*, 34 Id., 178, 182; Letter of Instructions, 34 Id., 194, 203; *Colorado Coal & Iron Co. v. United States*, 123 U. S., 307, 325, 328, 8 Sup. Ct., 181, 31 L. Ed., 182.

It is clear, therefore, that the mere fact that lands contain deposits of coal is not sufficient to warrant their disposition under the coal-land laws. They must contain "workable" deposits; that is, coal of

such quantity and quality as would warrant a prudent coal miner or operator in the expenditure and labor incident to the opening and operation of a coal mine or mines on a commercial basis.

Upon careful consideration of the case, the Department is of opinion that the lands in question do not contain coal of such quality and in such quantity as reasonably to warrant the conclusion that they are capable of being profitably mined or worked, and hence, following the principle above announced, that they are not subject to disposition under the coal-land laws.

The classification of lands by the Director of the Geological Survey is conducted for the advice and assistance of the Department in its care and disposition of the public lands and is not final or conclusive, being subject to the supervision and review of the Secretary of the Interior. While in this particular case the matters reported in Bulletin 541 were deemed by the Director sufficient to warrant classification as coal lands of the minimum value, the areas included in the claims of Cecil C. and Alta E. Carter, Herbert and Louise C. Lockhart, and a portion of that included in the claim of Flanagan, the Department, upon an extended review of all the evidence adduced in this case and of the facts upon which said classification was based, is not willing to concur therein, but believes that under the facts and the law the lands should be classified as noncoal in character. The said classification of the lands as coal is accordingly reversed, and the land will be noted upon the records of the General Land Office and the local land office as noncoal land.

Because of the classification as coal-land of the area included in the claim of Alta E. Carter, the Department, by decision of January 20, 1914, reversed the Commissioner's decision here appealed from, in so far as it involved that land, and remanded the record relating to her claim to the Commissioner for appropriate action. In view, however, of the revocation herein made of such former classification, the said decision of the Department in the case of Alta E. Carter is recalled and vacated.

The action of the Commissioner as to all the claims here in question is, accordingly, affirmed, and the applications will stand rejected.

SAMUEL D. PULFORD ET AL.

Motion for rehearing of departmental decision of July 12, 1916, 45 L. D., 494, denied by First Assistant Secretary Vogelsang November 27, 1916.

BUNKER HILL MINING AND CONCENTRATING CO.

Decided August 23, 1916.

MINING CLAIM—PATENT PROCEEDINGS—NONCONTIGUITY—NOTICE.

Where entry has been made for a group of mining claims, patent can not issue thereon for individual claims noncontiguous to each other, where there has been no discovery upon the intervening claims upon which they depend for their contiguity; but the entry may be permitted to stand and patent issued for the particular claim upon which the notice and plat were actually posted, provided a valid discovery and sufficient improvements were made thereon.

SWEENEY, Assistant Secretary:

This is an appeal by the Bunker Hill Mining and Concentrating Company from decision of the Commissioner of the General Land Office dated February 8, 1916, denying its request that a patent be issued for the Yreka No. 12, Yreka No. 14, Drew and B. lode claims. These claims, with 33 other lode mining claims, are embraced in mineral entry 07922, made by this company February 6, 1913, at Coeur d'Alene, Idaho.

Proceedings were instituted against this entry upon the report of a field officer, except as to the Yreka No. 12, Yreka No. 14, Drew and B. lode claims, October 7, 1915, upon the charge that there had been no valid discovery of mineral in rock in place and that the statutory amount had not been expended for their benefit. The record discloses that the notice of the application for patent and the plat were posted upon the Drew claim. The Drew and B., Yreka No. 12 and Yreka No. 14 are not contiguous to each other. The Commissioner states that upon each of these four claims a valid discovery has been made and the statutory amount has been expended. The company requested that patent be issued upon these four claims without awaiting the result of the adverse proceedings as to the remaining thirty-three.

In the case of William Dawson (40 L. D., 17), it was held (second paragraph of the syllabus):

Where a number of valid lode locations, forming upon the ground a contiguous group, are embraced in a single application for patent, upon which due publication and posting of notice has been had, and the application is rejected as to one of the claims because of insufficient patent improvements, the remainder of the claims, although not in themselves contiguous, may be retained and embraced in a single entry and patent.

The Department there said at page 24—

In the present case the locations upon the ground form one contiguous group, each of which from the record appears to be *bona fide* and valid as a location, and all the provisions of section 2325, Revised Statutes, for one survey and one plat, for posting one notice on the land embraced in the plat, for the publication

of one notice in a newspaper nearest to the claim, for the posting together of the notice of application for patent and the plat of survey in a conspicuous place on the land embraced in the plat, have been met.

In the Dawson case a group of five contiguous claims upon which a valid discovery had been made was rendered non-contiguous because the statutory amount had not been expended upon one of the group. The Department, however, permitted the entry to stand, and patent issued, although the entry had been rendered non-contiguous, modifying the previous practice.

In the present case, one of the charges made is that there has been no discovery of mineral upon the remaining claims upon which the four herein involved depend for their contiguity. Should such a charge be sustained, said claims will be non-contiguous upon the ground and could not be included in a single survey and entry. The statutory requirement for one survey and one plat, for posting one notice on the land embraced in the plat, and the other requirements, as pointed out in the above quotation in the case of William Dawson, could not be met. The decision of the Commissioner is accordingly correct as to the Yreka No. 12, Yreka No. 14 and the B. lode claims. However, the notice and plat were actually posted upon the Drew claim, which the Commissioner reports has a valid discovery and sufficient improvements. Even if the entry be cancelled as to all the other claims, the company would still be entitled to patent upon the Drew claim. No reason is therefore seen by the Department why patent may not now be issued as requested for the Drew claim. (Kohnyo and Fortuna Lodes, 28 L. D., 451.)

The decision of the Commissioner is modified as above indicated, and the matter remanded for issuance of patent upon the Drew claim, in the absence of other objection.

CENTRAL PACIFIC RY. CO.

Decided September 14, 1916.

CENTRAL PACIFIC GRANT—PYRAMID LAKE INDIAN RESERVATION.

Lands in the Pyramid Lake Indian reservation are excepted from the grant to the Central Pacific Railway Company made by the acts of July 1, 1862, and July 2, 1864.

VOGELSANG, *First Assistant Secretary*:

The Central Pacific Railway Company has appealed from decision of the Commissioner of the General Land Office of May 19, 1916, holding for cancellation Place List No. 1 as to lots 1 and 2, Sec. 13, T. 16 N., R. 19 E., SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 19, T. 19 N., R. 20 E., N. $\frac{1}{2}$, Sec. 5, S. $\frac{1}{2}$, Sec. 9, all of sections 15 and 27, and the E. $\frac{1}{2}$, Sec. 33, T. 21 N., R. 24 E., and E. $\frac{1}{2}$, Sec. 31, T. 22 N., R. 24 E., Carson City,

Nevada, land district. Said lands are within the primary limits of the grant made to the company by acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356).

Lots 1 and 2 of Sec. 13, T. 16 N., R. 19 E., and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 19, T. 19 N., R. 20 E., were disposed of prior to the definite location of the company's line of road, and the correctness of the Commissioner's decision with reference thereto is not questioned. The balance of the land above described is within the boundaries of the Pyramid Lake Indian Reservation, and the single question presented for determination is whether on November 14, 1867, the date of filing map of definite location of the company's line of road opposite this land, the same was reserved for the Indians, or whether their occupancy thereof was of the character which, by the second section of the act of July 1, 1862, *supra*, the United States was required to extinguish as rapidly as may be. If the former, the grant to the company did not attach, and if the latter, the same did attach. The President on March 23, 1874—

ordered that the tract of country known and occupied as the Pyramid Lake Indian Reservation in Nevada, as surveyed by Eugene Monroe in January, 1865, and indicated by red lines according to the courses and distances given in tabular form on the accompanying diagram, be withdrawn from sale or other disposition and set apart for the use of Pah-Ute and other Indians residing thereon.

The facts with reference to the establishment of this reservation are fully set forth in the Commissioner's decision, from which it appears that on November 29, 1859, the Commissioner of Indian Affairs advised the Secretary of the Interior that certain lands on the Truckee River, including Pyramid Lake and the lands in question herein, had been selected as an Indian reservation and recommended that the President be requested to issue an Executive order to cover same. The Commissioner of the General Land Office, by letter of December 8, 1859, directed the Surveyor-General at Salt Lake City, Utah, to reserve said lands for Indian purposes in accordance with the request of the Commissioner of Indian Affairs, and further directed that appropriate notations be made upon the map of the Utah surveying district showing the reservation, so that the same would be respected when surveying lines reached that locality. The Indians were then in the actual occupancy of the lands, and the reservation thus created excepted the same from the operation of the grant to the railway company.

It is well settled that the acts of the heads of Departments must be held to be the acts of the President. See *Wilcox v. Jackson* (13 Peters, 498, 513); *Wolsey v. Chapman* (101 U. S., 755, 769). The subsequent order of the President therefore was unnecessary for the purpose of establishing the reservation, and merely recognized and declared what had already been done.

In the case of *Minnesota v. Hitchcock* (185 U. S., 373, 390), the court said:

In order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain definite tract appropriated to certain purposes.

This matter was before the Department in 1891, and Assistant Attorney General Shields rendered an opinion thereon July 7th of that year to the effect that the lands included in the Pyramid Lake Indian Reservation were excepted from the grant to the Central Pacific Railway Company. This opinion was forwarded by the Secretary of the Interior to the Indian Office with directions that it be guided thereby in its actions in connection with the reservation.

It is urged in support of the appeal that the Department patented certain tracts of land in the reservation under the public land laws and issued patents to the Central Pacific Railway Company for certain tracts included therein subsequent to the establishment of said reservation in 1859. It will be observed, however, that with one exception, all the patents to which attention is called were issued prior to the opinion of the Assistant Attorney General above referred to, and the inclusion of lands within the reservation in the patent issued subsequent to that opinion was evidently an oversight.

The decision of the Commissioner is affirmed.

FRED ANDERSON.

Decided September 21, 1916.

RECLAMATION ENTRY—SECTION 5. ACT OF JUNE 25, 1910.

The proviso to section 5 of the act of June 25, 1910, as amended by the act of February 18, 1911, and section 10 of the act of August 13, 1914, that "where entries made prior to June 25, 1910, have been or may be relinquished, in whole or in part, the lands so relinquished shall be subject to settlement and entry under the reclamation law," applies only to entries of record next previous to the passage of the act, and can not be invoked upon the basis of a relinquished entry preceding the entry of record at the date of the passage of the act.

Vogelsang, *First Assistant Secretary*:

This is an appeal by Fred Anderson from the decision of the Commissioner of the General Land Office, dated May 27, 1916, holding for rejection his homestead application 017486, filed March 7, 1916, at Alliance, Nebraska, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 3, T. 22 N., R. 52 W., 6th P. M. within the North Platte irrigation project.

The above land was withdrawn under the second form of the Reclamation Act on May 3, 1904. October 8, 1904, Henry A. Kistler

made homestead entry 8697 for the NW. $\frac{1}{4}$ of said section 3. Kistler relinquished December 11, 1905, and upon the same day, Oscar H. Anderson made homestead entry 05821 for said northwest quarter. May 24, 1910, a farm unit plat was approved which divided the Anderson entry into two farm units, the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, or farm unit "H," and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, or farm unit "J." April 26, 1911, the entry made by Oscar H. Anderson was conformed to farm unit "H," or the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, which resulted in the cancellation of his entry as to the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, or farm unit "J."

November 23, 1915, a farm unit plat of the above township was approved. The public notice of January 13, 1916, included the tract in controversy. This public notice recited that it applied only to unentered lands and lands theretofore entered but relinquished or abandoned as shown on the farm unit plats, and provided that applications could be filed with the register and receiver on and after March 19, 1916, and that homestead entries of the farm units could be made on and after March 24, 1916, if found regular and accompanied by the certificate of the project manager showing that the water-right application had been filed and the proper water-right charges deposited.

As above stated, Anderson filed his application March 7, 1916, or prior to the date when the lands under the public notice of January 13, 1916, were to become subject to entry. He contended that the lands were subject to entry under the provisions of section 5 of the act of June 25, 1910 (36 Stat., 835), as amended by the act of February 18, 1911 (36 Stat., 917), and section 10 of the act of August 13, 1914 (38 Stat., 686). As so amended, this section now provides as follows:

That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior: *Provided*, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished, in whole or in part, the lands so relinquished shall be subject to settlement and entry under the reclamation law.

Anderson's contention apparently was that the original entry of Kistler having been relinquished, the lands were subject to entry under the above-quoted law. The register and receiver, however, by decision of March 16, 1916, held that the entry of Oscar H. Anderson was canceled as to the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 3, by virtue of his conformation to farm unit "H," or the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ of section 3, and not upon relinquishment; that therefore Anderson's application did not come within the provisions of the act of February 18, 1911, *supra*, as amended by the act of August 13, 1914, and that the application of

Fred Anderson was premature, since it was filed before the date fixed in the public notice. March 21, 1916, Fred Anderson filed notice of appeal to the General Land Office. March 24, 1916, Mary A. McDermott filed homestead application 017813 for farm unit "J," or the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 3, the register and receiver allowing her entry March 25, 1916.

Upon appeal, the Commission in his decision of May 27, 1915, held that the tract here in controversy became subject to entry when eliminated from the entry of Oscar H. Anderson, under the provisions of section 10 of the act of August 13, 1914, *supra*, citing the case of Lena Hektner (42 L. D., 462). The Commissioner then further stated:

However, it is provided by paragraph 5 of the General Reclamation Circular that a homestead application must not be received by the register and receiver of the local land office unless accompanied by a certificate from the Project Manager to the effect that the applicant has filed a water right application for the land applied for. As no water right application was filed by the applicant in this case, your action in rejecting the application was correct and is hereby affirmed subject to the applicant's right to appeal within thirty days from notice hereof.

It also appears that on March 25, 1916, you allowed homestead entry 017813, made by Mary A. McDermott for this same land. As Anderson's appeal was pending at that time, you should have rejected all homestead applications filed for the land until final disposition of the appeal.

The appellant contends that the Commissioner's ruling as to the failure of Fred Anderson to file the certificate of the project manager is incorrect, as it does not cite the entire provisions of paragraph 5 of the General Reclamation Circular as amended to September 6, 1913. Section 5 of the Reclamation Circular provides that homestead entries of lands platted to farm units and covered by public notices may be allowed by the registers and receivers if found regular "and accompanied by certificate of the project manager showing that water-right application has been filed and the proper water-right charges deposited." Paragraph 5 then further provides:

No application to make homestead entry of lands within a reclamation project and covered by public notice will be allowed unless accompanied by such certificate of the project manager. If no such certificate is filed, the register and receiver will notify the applicant that unless such certificate is filed within thirty days the homestead application will be rejected without further notice and the case closed. If such certificate be filed before rejection the application will be allowed if otherwise regular. Where under the reclamation law lands within the reclamation project are subject to entry notwithstanding public notice covering said lands has not yet issued, such certificate of the project manager is not required, and in such cases the application, if otherwise regular, will be received and entry allowed.

The appellant contends that the register and receiver, under the above regulation, should have notified him that he would be permitted

thirty days within which to obtain the proper certificate from the project manager. In the view of the Department, as hereafter stated, this contention need not at this time be determined nor the correctness of the Commissioner's ruling in that respect.

Under the appellant's main contention as made before the register and receiver, it would follow that the act of February 18, 1911, as amended by section 10 of the act of August 13, 1914, would be applicable to any tract covered by an entry made prior to June 25, 1910, and relinquished, although such relinquishment may have antedated the original act of June 25, 1910, by any number of years. Such a construction the Department believes is far beyond the scope of the act as intended by Congress.

In the case of Fred V. Hook (41 L. D. 67), the Department held that the act of February 18, 1911, had no application where cancellation of the entry was the result of a contest and not of a relinquishment. The Department quoted the language of the Commissioner that it was the purpose of that act to allow homestead entrymen who made entry prior to June 25, 1910, "to relinquish their entries and sell their improvements to prospective entrymen, but no provision was made for the allowance of entries upon such lands uncovered in any other manner than through relinquishment."

The case of Lena Hektner, cited by the Commissioner, involved a tract which was covered by a homestead entry prior to June 25, 1910. This entry was relinquished September 20, 1911, and a second entry was made therefor September 21, 1911, by another party. The relinquishment of the second entry was filed April 23, 1912, upon which day Hektner was allowed by the register and receiver to make homestead entry. No farm unit plat had been approved and no public notice issued fixing the amount of water-right charges and the date when water could be applied. Hektner had gone into possession of the land, made compliance with the requirements of the homestead law, and had made valuable improvements at considerable expense. The Department there held that the tract having been covered by an entry made prior to June 25, 1910, and relinquished, the fact that an intervening entry was also made and likewise relinquished did not prevent the operation of the act of February 18, 1911. This case, however, is not authority for the proposition for which it is apparently cited by the Commissioner, since in the present matter the entry of Oscar H. Anderson was not canceled upon relinquishment. The previous entry of Kistler had been canceled upon relinquishment and Kistler did not belong to that class of entrymen for whose protection the act of February 18, 1911, was passed. His relinquishment was filed prior to the passage of the act of June 25, 1910, which in section 5 prohibited the allowance of entries upon lands withdrawn for irrigation purposes, and the land had been reentered.

The purpose of the act of February 18, 1911, was also stated by the Department in the case of Fredrek Steebner (43 L. D. 263), which pointed out that the act was passed for the relief of such entrymen who had been or would be by reason of the provisions of the act of June 25, 1910, prevented from realizing the value of the improvements placed by them on their entries by sale of such improvements to others desiring to make entry for the lands upon relinquishment of their vendors' entry therefor, as might have been done prior to June 25, 1910. In the Steebner case, the previous homestead entry, which had not been made under the provisions of the reclamation act, had been canceled by the Commissioner for failure to make final proof. The register and receiver, however, the previous entrymen, and Steebner, were all in ignorance of that fact. Steebner purchased the previous entryman's relinquishment in good faith, filed it in the local land office, and was allowed to make entry for the land. The Department held that his case fell within the provisions of the act of February 18, 1911, and allowed his entry to remain intact.

Taking into consideration the class of persons for whose relief the act of February 18, 1911, was passed, the Department is of the opinion that it is self-evident that Congress had in mind the entry of record next previous to the passage of the act. If such entry were canceled upon relinquishment, it provided that the tract covered thereby should be open to entry notwithstanding the general provisions prohibiting such entry. In the present case, the entry of Oscar H. Anderson was not canceled upon relinquishment and therefore there is no room for the operation of the act of February 18, 1911. Further, the land was vacant and unappropriated at the time the public notice of January 13, 1916, was issued, and the present appellant shows no equities in him which would warrant the Department in allowing him to practically secure a preference right to enter the tract under an application filed before the date the lands became subject to application or entry under the public notice. The Department is accordingly of the opinion that the Commissioner has arrived at a correct conclusion in the matter, although, perhaps, by an erroneous course of reasoning.

The decision of the Commissioner is affirmed, and the entry of McDermott will be held intact.

FRED ANDERSON.

Motion for rehearing of departmental decision of September 21, 1916, 45 L. D., 504, denied by Assistant Secretary Sweeney November 6, 1916.

D. B. BOWERS.*Decided September 30, 1916.***INDIAN ALLOTMENT—EXCHANGE—ACT OF OCTOBER 19, 1888.**

The relinquishment of allotted lands in the Uintah and White River Ute Indian Reservation and the selection in lieu thereof of lands within the grazing reserve established by the joint resolution of June 19, 1902, as modified by the acts of March 3, 1903, and March 3, 1905, is authorized and governed by the provisions of the act of October 19, 1888; and not the exchange provisions of the act of March 3, 1909, which are applicable only where allotted lands are exchanged for *ceded* lands.

RELINQUISHMENT OF ALLOTMENT—DISPOSAL OF LANDS.

Allotted lands relinquished under the act of October 19, 1888, as a basis for selection of other Indian lands in lieu thereof, are not subject to disposal under the homestead laws.

SWEENEY, Assistant Secretary:

This is an appeal by D. B. Bowers from a decision of the Commissioner of the General Land Office dated May 8, 1916, rejecting his homestead application 05705 for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 3, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 10, T. 2 S., R. 1 E., U. S. M., Vernal land district, Utah.

The lands in question were formerly embraced in the Uintah and White River Ute Indian Reservation, and were covered by Indian allotments Nos. 599, 602 and 603, of Jane Pike, Anna Pike and Minnie Pike, which were canceled and lieu selections made upon the grazing reserve.

The Uintah and White River Ute Indians were allotted lands under the provisions of the act of May 27, 1902 (32 Stat., 263), and patents for the lands so allotted were issued under the provisions of the general allotment act of February 8, 1887 (24 Stat., 388).

Under the provisions of joint resolution of June 19, 1902 (32 Stat., 744), as modified by the acts of March 3, 1903 (32 Stat., 998), and March 3, 1905 (33 Stat., 1069), grazing lands for use of the Indians in common, approximating 250,000 acres, were reserved by the Department under date of July 11, 1905.

In denying the application the Commissioner referred to a letter dated January 16, 1912, by the Commissioner of Indian Affairs to Charles S. Davis, supervisor in charge of the Uintah and Ouray Agency, which was approved by the Department, regarding changes in allotments by the Indians of the Uintah and White River tribes, in which it was held that ample authority existed under the act of October 19, 1888 (25 Stat., 611), to permit any members of the Uintah and White River Ute tribes, heretofore allotted lands not valuable for agricultural purposes and which could not be irrigated, to relinquish said allotments and select in lieu thereof lands from the grazing reserve. This letter also contained the following paragraph:

It should be understood, of course, that on the acceptance of any relinquishments in accordance with the foregoing, the cancellation of the original trust

patents and the issuance of new patents for the lieu lands wanted, the lands relinquished by the Indians comprised in their former allotments will become a part of the lands heretofore reserved as grazing lands for use of the Indians in common.

Under this authority the allotments covering the lands here in question were canceled and the Indians were allowed to take lieu lands upon the grazing reserve.

There are two acts providing for relinquishments of Indian allotments and the selection of other lands in lieu thereof. The act of October 19, 1888 (25 Stat., 611), provides as follows:

SECTION 2. The Secretary of the Interior is hereby authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under the statute aforesaid, to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: *Provided*, That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of the act of February eighth, eighteen hundred and eighty-seven.

The act of March 3, 1909 (35 Stat., 781), provides:

That if any Indian, or a tribe whose surplus lands have been or shall be ceded or opened to disposal has received or shall receive an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

It is urged in the appeal to the Department that the later of these acts, in which it is provided that the lands described in the canceled allotment shall be disposed of as other ceded lands, should govern the case here presented, and the homestead application should be allowed.

From an examination of the act of October 19, 1888, it will be observed that the same is a general statute, providing for the relinquishment of allotted lands and the selection of other reservation lands, whereas the act of March 3, 1909, *supra*, provides that where selection is made of lands within the ceded portion of a reservation in lieu of allotted lands relinquished, the relinquished lands shall become subject to disposal as other ceded lands in the reservation. In other words, it is provided that where an Indian relinquishes allotted lands and takes ceded land in lieu thereof, such relinquished lands shall, in compensation for the lieu lands, be disposed of as other

ceded lands on the reservation. In the case here under consideration the lieu lands selected were not ceded lands but other Indian lands. To a transaction of this kind, therefore, the act of March 3, 1909, has no application, and the exchange of lands was properly made under the act of October 19, 1888.

The unallotted, unreserved lands which were restored to the public domain within the Uintah Reservation were opened to disposal by proclamation of July 14, 1905 (34 L. D., 1), but the particular area here in question was at that time covered by Indian allotments and was wholly unaffected by such proclamation. The lands were then and are still Indian lands and are not subject to disposal under the homestead law.

The decision appealed from is accordingly affirmed.

FORT ASSINNIBOINE IRRIGATION COMPANY.

Decided September 30, 1916.

FORT ASSINNIBOINE MILITARY RESERVATION—ACT OF FEBRUARY 11, 1915.

The mere filing in the office of the county recorder of a notice of intention to claim certain unsurveyed lands under the desert land laws and of an appropriation of water for the purpose of irrigating the same, does not constitute the initiation of a right thereto under the act of March 28, 1908, which may be perfected under section 3 of the act of February 11, 1915, providing for the opening of lands within the Fort Assinniboine abandoned military reservation.

SWEENEY, *Assistant Secretary*:

The Assinniboine Irrigation Company has appealed from the decision of the Commissioner of the General Land Office, dated March 5, 1913, dismissing its protest against the action of the custodian of the Fort Assinniboine abandoned military reservation, ejecting and restraining said company and certain individuals named in the appeal, members of the company, from improving and otherwise attempting to reclaim certain lands within the reservation claimed by them under the desert-land laws. Action on this appeal was ordered suspended by the Department, pending legislation, in its decision of January 7, 1914. The matter has been orally argued before the Department.

The reservation was turned over to the Interior Department by Executive order of November 20, 1911, for disposal under the act of July 5, 1884 (23 Stat., 103), or as might otherwise be provided by law. The act of April 28, 1896 (29 Stat., 95), provided that lands which had been or might thereafter be excluded from the limits of the Fort Assinniboine military reservation should be open to the operation of certain laws, among them the desert-land laws. The

lands within the abandoned military reservation were withdrawn from entry and all forms of disposal until March 5, 1913, by order of the Commissioner of the General Land Office, dated February 14, 1912, pending legislation. They were again withdrawn by Executive order of August 25, 1913, until March 5, 1915, under the provisions of the act of June 25, 1910 (36 Stat., 847), unless Congress should in the meantime enact legislation with reference thereto.

The act of February 11, 1915, (38 Stat., 807), provides for the survey, classification and opening to entry of lands within the abandoned Fort Assinniboine military reservation. Section 3 of the act provides:

That any rights which may have attached to any of said lands under any of the public land laws of the United States prior to the passage of this act may be perfected and the lands so affected may be patented upon proof of compliance with the laws under which such rights so attached.

This provision was added by amendment to S. 655, which later became the act of February 11, 1915, *supra*. The particular lands claimed by members of the Assinniboine Irrigation Company lie in T. 32 N., R. 15 E., and have been surveyed in the field, the plat having been approved February 24, 1913. This plat, however, has not yet been filed in the local land office.

The claims here asserted are under the act of March 28, 1908 (35 Stat., 52), which gives to any qualified individual—

who has, prior to survey, taken possession of a tract of unsurveyed desert land * * * and has reclaimed or has in good faith commenced the work of reclaiming the same—

a preference right to make entry of the tract within ninety days after the filing of the approved plat of survey in the district land office. The regulations approved September 30, 1910 (39 L. D., 253), as to the above provision of the act of March 28, 1908, said in paragraph 7:

A mere perfunctory occupation of the land, such as staking off the claim, or posting notices thereof on the land claimed, would not secure the preference right as against an adverse claimant, but occupation in entire good faith, accompanied by acts and works looking to the ultimate reclamation of the land, are necessary and required.

The Department in its report of June 6, 1913, upon a proposed amendment to S. 655, granting a preference right of entry to the individuals composing the Assinniboine Irrigation Company, said:

It appears from papers submitted to the General Land Office that on December 2, 1911, the Assinniboine Irrigation Company, composed of George W. Dewar, Margaret A. Dewar, Leon E. and Mae B. Choquette, Marie Violet Lepper, Laura E. Devlin, and Hazel C. Kennedy, filed in the county recorder's office notice of the appropriation of water for the purpose of irrigating certain lands including, among others, the lands described in the proposed amendment now under consideration. There were also filed in the county recorder's office on December 7, 1911, declarations of occupancy for the desert-land entry of

unsurveyed lands, which, when surveyed, would probably be described as given in the proposed amendment to said Senate bill. Margaret A. Dewar filed one of the declarations, but the bill does not include her name as one of those to be given relief.

It was claimed in the papers submitted that a civil engineer was employed by said parties to survey the land and to ascertain the levels, drainage, etc., in order that the dams, ditches, and other improvements might be immediately started. It was further shown that in March, 1912, an order was given for two car-loads of fence posts to be used on the reservation by the parties who have located said desert land claims.

It was claimed by the parties that they were endeavoring to acquire title to the lands under the desert-land laws as provided in said act of April 18, 1896. The lands claimed by said parties were unsurveyed until last fall, when the field work was done.

The act of March 28, 1908 (35 Stat., 52), provides that no desert land entries of unsurveyed lands were to be allowed or made of record. It is provided in said act, however, that any individual qualified to make entry of desert lands, who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding 320 acres in area, and has reclaimed or has in good faith commenced the work of reclaiming same, has a preference right to make entry for ninety days after the filing of the plat.

It did not appear that the parties mentioned did any act by which they acquired any right to the land. There is no provision of law by which such rights can be acquired by simply filing in the office of the county recorder notice of the appropriation of water, or that certain parties intend to claim land under the desert land laws.

From the above it is clear that the claimants had failed to initiate any right under the public land laws prior to the passage of the act of February 11, 1915.

The decision of the Commissioner is correct and is accordingly affirmed.

MCKINLAY v. BEAR RIVER COAL CO.

Decided October 3, 1916.

COAL LAND APPLICATION—TRESPASS.

The fact that an applicant to purchase under the coal land laws may have trespassed by the removal of coal for the purpose of sale while the land applied for was embraced in an order of withdrawal does not of itself invalidate the application.

SWEENEY, *Assistant Secretary*:

This is an appeal by Edward S. McKinlay from a decision of the Commissioner of the General Land Office, dated May 25, 1916, dismissing his protest against coal application No. 09684, filed August 21, 1915, at Glenwood Springs, Colorado, by The Bear River Coal Company, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 6 N., R. 87 W., 6th P. M.

The above township was withdrawn from entry and reserved for classification and appraisal with regard to coal values by Executive

order of July 7, 1910. The tracts here involved were classified July 12, 1915, as follows: SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, \$96 per acre; SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, \$65 per acre; NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, \$103 per acre; NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, \$60 per acre. July 31, 1915, the withdrawal order as far as these tracts are involved was revoked. The applicant has paid the total purchase price, to wit, \$12,960.

The Commissioner in his decision summarized the allegations contained in McKinlay's protest as follows:

The said McKinlay in his protest asserted, in the first place, that the said company had taken possession of and had made improvements upon the land while it was withdrawn. But as the application to purchase, serial 09684, follows substantially the form utilized in the purchase of coal land under the provisions of Sec. 2347 of the revised statutes, and since the land was, August 21, 1915, subject to filing under the provisions of the said section, it becomes immaterial whether the improvements of the company had been made upon withdrawn land.

The protest charged in addition (1) trespass by the Bear River Coal Company in having mined coal upon the land while withdrawn, (2) failure to give notice of appraisal and revocation, and (3) under-appraisal of the tracts. In regard to these, it may be said, as to the first, that it presents a matter obviously not germane to this letter; as to the second, that this office has no information that the usual procedure was not followed; and as to the third, that this office has no knowledge that a proper appraisal was not had.

The Department is of the opinion that the Commissioner's decision is correct. As far as the alleged trespass by the Bear River Coal Company while the tracts were still embraced in the order of withdrawal is concerned, the case is analogous to that of *Litch v. Scott* (40 L. D., 467), which held that the fact that a homestead entryman may have trespassed by the removal of sand and gravel for the purpose of sale from the land embraced in his unperfected entry does not of itself necessarily invalidate the entry. Here likewise the fact that the applicant may have trespassed by the removal of coal for the purpose of sale does not invalidate its application to purchase the land under the coal land laws if it be otherwise qualified.

The decision of the Commissioner is accordingly affirmed.

C. B. ELWELL.

Decided October 3, 1916.

PROOFS, AFFIDAVITS, OATHS—OFFICERS—SECTION 2294, R. S.

Under section 2294, Revised Statutes, proofs, affidavits, and oaths concerning entries of the classes specified in the statute may be taken before any of the officers therein named in the county, parish or land district in which the land is situated; and the Commissioner of the General Land Office is without

authority to forbid the local officers to authorize the taking of proofs before any officer named in the statute, merely because his office is located in the same town as the local land office.

VOGELSANG, First Assistant Secretary:

This is an appeal by C. B. Elwell, a United States Commissioner for the District of Montana, residing at Havre, Montana, from certain instructions of the Commissioner of the General Land Office dated July 28, 1916.

Certain charges had been made reflecting upon the manner of taking final proofs as conducted by one George W. Glass, Clerk of the District Court for Hill County, Montana, and located at Havre, Montana. In the instructions of July 28, 1916, after directing the register and receiver at Havre to set no more proofs before said Glass, the Commissioner said:

You are also advised that it is the desire of this office to have all land office business at Havre, Montana, transacted before your office, and you are hereby directed to have no business of the kind mentioned above set before any other office in Havre than your own.

It is from the order as stated in the paragraph above quoted that the present appeal is taken.

The appellant states that there have been no charges made reflecting upon the manner in which final proofs have been taken by himself, and contends that the order violates his rights as a United States Commissioner and the rights of the entrymen to make their proofs before qualified officers as provided in existing law.

Section 2294, R. S., as amended by the act of March 4, 1904 (33 Stat., 59), provides:

That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner * * * in the county, parish, or land district in which the lands are situated.

The statute further provides that proofs, affidavits and oaths so taken shall have the same force and effect as if made before the register and receiver, when transmitted to them with the proper fees and commissions, and imposes penalties for false swearing. The statute also regulates the fees to be charged by said officer and imposes a penalty for excess charges.

Under the statute, therefore, proofs, affidavits and oaths concerning the character of entries specified in the statute may be taken before the United States Commissioner. No charges reflecting upon the conduct of the present appellant have been made, and the Department knows of no statute or regulation which would permit of the

order of the Commissioner as made in this case. No reason is apparent why final proofs may not be taken before the appellant as well as other United States commissioners in good standing within the Havre land district.

The order of the Commissioner, so far as it includes the taking of proofs before the present appellant, is accordingly reversed.

THEODORE F. SPREITER.

Decided October 24, 1916.

SWAMP LANDS—MINNESOTA DRAINAGE LAWS—EXCESS BIDS.

Where there has been more than one sale of lands by the State of Minnesota for delinquent drainage taxes under the act of May 20, 1908, and the respective purchasers failed to consummate their purchases by entry, a subsequent purchaser from the State under that act will be required to pay the excess bid made by the last preceding purchaser, together with the other payments required to be made under the act, but will not be required to pay the excess bids of any earlier preceding purchasers.

SWEENEY, Assistant Secretary:

This is an appeal from a decision of the Commissioner of the General Land Office of May 29, 1916, and involves the question of whether an applicant to purchase land under the Minnesota drainage act of May 20, 1908 (35 Stat., 169), is required to pay more than one excess bid made therefor at the sale by the State.

The facts are as follows: The SW. $\frac{1}{4}$, Sec. 2, T. 162 N., R. 34 W., 5th P. M., Crookston, Minnesota, land district, was sold May 11, 1914, to one Alex Pirie for delinquent drainage taxes assessed for the year 1912. Pirie made an excess bid therefor of \$20 and paid the sum of \$13.80 taxes. He did not, however, make entry for the land and the same was again sold May 15, 1915, to one James L. Leighty, for delinquent 1913 drainage taxes, who made an excess bid of \$55 therefor and paid the sum of \$10.92 taxes. August 7, 1915, Leighty assigned to Theodore F. Spreiter the certificates of purchase issued to him by the county auditor, and August 13, 1915, Spreiter filed application in the local office to purchase the land under said act of May 20, 1908, *supra*, showing the taxes to have been paid, and paid the excess bid of \$55 above referred to. The application was, however, rejected for the reason that the taxes for 1912 had not been paid and because the excess bid of \$20, made in connection therewith, was not paid. The applicant thereupon paid the 1912 taxes but did not pay the excess bid of \$20, and appealed to the Commissioner of the General Land Office, who held, by the decision above mentioned, that said excess bid of \$20 must be paid before Spreiter would be allowed to purchase the land under said act, citing the case of Edward F. Melony (45 L. D., 12).

The land involved is public land of the United States and is liable for drainage taxes the same as lands in private ownership included in drainage projects in the State of Minnesota. Such taxes are assessed under the laws of that State, which provide for the filing in the office of the register of deeds of a statement prepared by the auditor, showing, among other things, the amount assessed against each tract included in the project. The amounts so assessed are made liens on the property and the method of payment is provided by section 2631, Revised Laws of Minnesota, 1909, as follows:

One-tenth of such principal on or before one year from such filing in the office of the register of deeds, and one-tenth each year thereafter until the whole thereof is paid. Provided, that if in the final order establishing said ditch, or at any time thereafter, the judge of the district court or the county board, in his or its discretion, so orders, then payment of such lien shall be made to the said treasurer as follows: One-fifteenth of said principal on or before five years from the date of said filing in the office of the register of deeds, and one-fifteenth each year thereafter until the whole amount of said principal is paid. The said principal lien shall bear interest at a rate not to exceed six per cent per annum reckoned from the date of the filing of the lien statement in the office of the register of deeds, and interest on the whole of the principal of such lien remaining from time to time unpaid shall be paid annually except as hereinafter in this section otherwise provided. On or before the 15th day of November next following such filing the county auditor shall enter on the tax lists of said county the whole amount of such lien remaining unpaid against each respective tract of land subject thereto, with a proper notation to secure the successive entry each year thereafter of the unpaid balance of such lien and the interest thereon and the portion of the principal of such lien due each year and all accumulated interest, and each thereof shall become due and payable and shall be collected at the same time and in the same manner as real estate taxes for that year on the tract in question become due, payable and are collected, and all of the provisions of law now or hereafter existing in relation to the collection of real estate taxes so far as applicable thereto, are hereby adopted for the purpose of enforcing payment of such liens and of the installments thereof and of the interest thereon and of each of the same.

Unless the amount due each year is paid the land is subject to be sold, and immediately upon unentered lands, or lands covered by an unpatented entry, being sold in the manner provided by the laws of Minnesota, a statement showing the price at which each legal subdivision is sold is officially certified to the register and receiver of the local office of the land district in which the land is situated, and a purchaser of unentered lands, having the qualifications of a homesteader, may thereupon make entry therefor, not exceeding, however, 160 acres, under section 5 of the act of 1908. In addition to payment of the usual fees and commissions, he is required to pay the amount of any excess bid made for said land.

Purchasers of unpatented lands, embraced in existing entries, at such sales may make entry therefor after the expiration of the period of redemption provided by the laws of Minnesota, where the property

is not redeemed, upon payment to the local officers of the fees, commissions, and so much of the purchase money at \$1.25 per acre as may not have been paid by the entryman, and the excess, if any, bid at sales of such lands, said excess being paid for the benefit of the entryman.

If purchasers of unentered lands do not make entry therefor and pay the required amount within 90 days after the date of sale, or if purchasers of entered lands fail to make entry therefor within 90 days after the right of redemption has expired where the property is not redeemed, any person having the qualifications of a homesteader may pay to the proper receiver for not more than 160 acres of land for which entry has not been made—

First, the unpaid fees, commissions, and purchase price to which the United States may then be entitled; and, second, the sum at which the land was sold at the sale for drainage charges, and in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount at which the land was sold at the sale for drainage charges, together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charge, if the land when sold was unentered.

In the case of Edward F. Melony, *supra*, cited by the Commissioner, the Department held that the amount of an excess bid must be paid by a subsequent purchaser, but only one excess bid was involved in that case.

The land involved herein was unentered public land and Alex Pirie, the original purchaser at the sale for the delinquent 1912 taxes, had a preference right to enter same for 90 days from May 11, 1914, the date of said sale. He failed, however, to make entry therefor, and had the present applicant, or any one else, applied to purchase the land in accordance with said act prior to the second sale thereof, they could have purchased the same upon payment of the requisite fees, commissions and purchase money due the United States together with the drainage charges then due and the excess bid made by Pirie. The United States would then have received only one excess bid. No one, however, applied to purchase the land under said act and, another installment of taxes having become due, the same was again sold and the excess amount bid at the time of this sale was \$55.

After said sale was made the excess bid at the first sale no longer constituted a charge against the property required to be paid in connection with making entry therefor, but instead it became necessary to pay the amount of the excess bid at the second sale. To hold otherwise would permit an accumulation of excess bids from year to year and the amount required for the purchase of a tract after the

same had been sold under the State laws for a number of years might be so great as to prevent the land being acquired at all.

An amount bid in excess of the taxes against a particular tract presumably represents the amount that the purchaser is willing to pay in addition to the other charges against the land in order to acquire a preference right to enter the same under the act of 1908, and since the bidding is competitive such amount is probably the most that can be obtained. Even if entry should be made for the land and the accumulated excess bids paid, no reason is seen why the United States, in cases of unentered lands, or entrymen in cases of entered lands which have not been patented, should receive such a bonus.

It is accordingly held that in cases arising under the act of May 20, 1908, *supra*, the last excess bid only will be required to be paid by the purchaser, together with the other payments required to be made.

The decision of the Commissioner is reversed and the application to purchase will be allowed upon the payment of all taxes due and unpaid against the property in question.

INSTRUCTIONS GOVERNING REPAYMENTS.

CIRCULAR.

[No. 513.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 25, 1916.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: The following regulations and instructions governing the repayment of moneys received by the Government and covered into the United States Treasury, in connection with the disposal or attempted disposal of the public lands, are promulgated for your guidance and the information of the general public.

In addition to the provisions of sections 2362 and 2363, United States Revised Statutes, it will be observed from the laws printed in full as an appendix to this circular, that the general laws providing for the return of such moneys are contained in the acts of June 16, 1880 (21 Stat., 287) and March 26, 1908 (35 Stat., 48).

You will strictly observe and enforce the instructions herein contained.

APPLICATIONS.

1. The following form of application for repayment is intended to cover every class of claims arising under the provisions of said acts, but the form may be modified by striking out such portions thereof as may be irrelevant to the particular claim presented:

The Commissioner of the General Land Office:

I hereby make application for the repayment of such amount of money as may be found due, paid in connection with _____ No. _____, for the
(Kind of application, etc.)

Section _____, Township _____, Range _____, _____ Meridian, as per Receiver's Receipt, No. _____, issued at _____, dated _____, which is surrendered herewith; and on oath declare that I am the same (or legal representative of the) person who made said payment and that there was no fraud or attempted fraud in connection with the effort to obtain title to the land described; that I have not sold, assigned, nor in any manner encumbered, the title to the land described, and that the same has not become a matter of record.

(Signature of applicant.)

(Post-office address.)

State of _____
County of _____

Subscribed and sworn to before me this _____ day of _____

(Official designation.)

2. The affidavit necessary to an application for repayment may be made before either the register or receiver, or any officer authorized to administer oaths and using a seal.

3. When made before a justice of the peace, a certificate of official character is required.

ACT OF JUNE 16, 1880.

FEES, COMMISSIONS, EXCESSES, ETC.

ON FRAUDULENT AND VOID ADDITIONAL SOLDIERS' AND SAILORS' ENTRIES.

4. Section 1 of this act authorizes the repayment of the fee, commissions, and excess payments required upon the location or entry of soldiers' and sailors' additional homestead rights, which locations or entries are found to be based upon spurious or forged papers and the entries are canceled as fraudulent and void.

5. Under this section repayment can be made only to the "innocent parties" who paid the moneys, and in order to present a claim thereunder it is necessary that the receipts issued to the claimant be surrendered as a part of the application for repayment.

6. In case the receipts can not be surrendered an affidavit explaining the loss or destruction of the same is required, together with evidence to show that the moneys applied for were paid by the applicant.

7. The applicant will be required, in all cases where the void location or entry is made in the name of the original entryman, to furnish the power of attorney, or certified copy thereof, authorizing the applicant to make the additional entry; or furnish such other authenticated evidence as may be produced to show that the applicant is in fact the party who made the void additional entry and paid the moneys in connection therewith.

8. A concise statement, in the form of an affidavit, should accompany these applications for repayment, setting forth all the facts and circumstances in connection with the procurement and use of the fraudulent papers upon which the canceled entry was based, together with such other proof as may tend to establish the innocence of the applicant.

ON ENTRIES CANCELED FOR CONFLICT OR WHERE THE SAME HAVE BEEN
ERRONEOUSLY ALLOWED AND CAN NOT BE CONFIRMED.

9. The first clause of section 2 of this act provides for the repayment of fees, commissions, purchase money, and excesses paid in connection with entries of the public lands that have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry was erroneously allowed and can not be confirmed. This clause directs that said moneys shall be repaid to the person who made such entry, or to his heirs or assigns, and it requires the surrender of the receipts issued and the execution of a proper relinquishment of all claims to the lands acquired under the invalid entry.

10. Claims for repayment should be made on form 4-109, or the equivalent thereof, which application must contain an affidavit stating that the title to the land, under the invalid entry, has not been sold or assigned, and that the same has not become a matter of record.

11. In cases where the entry has been made a matter of record, in the archives of the county recording officer, there should be added to the form of application (4-109) the words "except as shown by accompanying evidence," in which event the evidence hereinafter required must be furnished.

12. A duly executed relinquishment must be furnished by the applicant in the following or equivalent form:

I hereby relinquish to the United States all my right, title, and interest in and to entry No. _____, made at _____, 19____,
(Name land office where entry was made.)
the land being described as follows: _____

_____ section _____
Township _____, Range _____, _____ Meridian.

(Signature.)

Witnesses:

(Name and address.)

(Name and address.)

Acknowledged before me this _____ day of _____, 19____.

(Official designation of officer.)

13. This relinquishment may be acknowledged before the register or receiver or before any officer authorized to take acknowledgments.

14. If acknowledged before a justice of the peace, a certificate of official character is required.

15. In cases of commutation homestead entry, final homestead entry, final desert-land entry, and other final certificates, which are canceled, leaving the original entry or base intact, subject to future compliance with the requirements of law, a reservation should be incorporated into the relinquishment to the effect: "But excepting from the operation of this relinquishment all my rights and title to the described land under original entry No. _____."

16. The receipts, showing the payments of the moneys claimed, must be surrendered and also the duplicate certificates; but if the same have been lost or destroyed, an affidavit stating the facts must be furnished.

FINAL ENTRIES.

17. With applications for repayment of the moneys paid upon canceled commuted homestead entries, final homestead entries, final desert-land entries, mineral entries, coal-land entries, and other final entries, the receiver's receipt and the duplicate certificate of entry, whenever such has issued, should be surrendered.

18. In case the receipt or certificate can not be surrendered or has been lost or destroyed, a certificate will be required from the proper recording officer of the county within which the land is situate, showing that the same has not become a matter of record and that there is no encumbrance of the title to the land thereunder.

19. A recorder's certificate must be furnished, as above, (a) in all cases where the application for repayment is made by another than the original entryman, and (b) in all cases where the claim is based upon an unrecorded deed from the entryman to the party applying for repayment.

20. In all cases where patent has been issued, upon an invalid entry, a full reconveyance to the United States of all right and title to the land acquired under the patent and entry must be furnished, which deed must be recorded. If a certificate of the recording officer is produced showing that neither the entry nor the patent has been recorded, it is unnecessary to record the reconveyance in case the patent is surrendered.

21. If, however, the patent can not be surrendered, or should the entry or patent have been recorded, it is necessary that the proper party or parties execute a full reconveyance to the United States and have the same recorded as indicated in the next following paragraphs.

22. Where title under an invalid entry or patent has become a matter of record, a duly executed quitclaim deed, relinquishing to the United States all right, title, and claim to the land, acquired under the entry, or patent, must accompany the application for repayment.

23. This deed must be duly recorded, and a certificate must also be produced from the proper recording officer of the county wherein the land is situate, showing that said deed is so recorded and that the records of his office do not exhibit any other conveyance or incumbance of the title to the land.

24. The reconveyance to the United States must conform in every particular to the laws of the State or Territory in which the land is located relative to transfers of real property; in the case of a married man, in localities where the right of dower, or equivalent, exists, the wife must join in the execution of the deed, and in case of an executor or administrator, due proof of authority to alienate the estate.

25. If the applicant has also acquired the valid title conveyed by the United States, a reconveyance of the land is unnecessary, but a relinquishment, waiving all claim under the illegal entry, is required, together with corroborative evidence of the facts, preferably an abstract of title and a statement in full in support of the claim for repayment.

HEIRS, EXECUTORS, ADMINISTRATORS, AND ASSIGNEES.

26. Where application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained and must show that the parties applying are the heirs and the only heirs of the deceased.

27. Proof of heirship should be made in the form of an affidavit, corroborated by two witnesses, setting forth the date of the death of the intestate; whether the intestate left surviving a husband or wife, as the case may be; the full name and age of such husband or wife; the names and ages of all children; and also state whether there is any issue of a deceased child or children. The affidavit should set forth all the facts, in order that this office may determine who are the legal heirs, in accordance with the laws of descent and distribution of the State where the land is situated.

28. In case there are minor heirs not under the guardianship of a duly appointed guardian, and the amount to be repaid is \$200 or less, the surviving parent may execute the application as the natural guardian of such heirs. Such application should be supplemented with an affidavit stating all the facts in detail.

29. Where application is made by executors, a certificate of executorship from the probate court must accompany the application.

30. Where application is made by administrators, the original, or a certified copy, of the letters of administration must be furnished.

31. Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instruments of assignment, or certified copies thereof.

32. In the place of an abstract of title the applicant may furnish a certificate of the recording officer of the county in which the land is situate, showing all alienations or liens affecting title to the land in connection with the entry upon which the claim for repayment is based.

33. The applicants must also show by affidavits or otherwise that they have not been indemnified by their grantors or assignors for the failure of title, and that title has not been perfected in them by their grantors through other sources.

34. Where there has been a conveyance of the land and the original purchaser applies for repayment, he must show that he has indemnified his assignee or perfected the title in him through another source, or produce a full reconveyance to himself from the last grantee or assignee.

35. Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law.

36. To construe said statutes so as to recognize the assignment or transfer of the mere claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or attempted transfer of title thereto, would be against the settled policy of the Government and repugnant to section 3477 of the Revised Statutes. (2 Lawrence, First Comp. Dec., 264, 266, and 6 Dec. Comp. of the Treasury, 334, 359.)

37. Assignees of land who purchase after entry are, in general, deemed entitled to receive the repayment when the lands are found to have been erroneously sold by the Government. But this rule does not apply to the repayment of double-minimum excesses. (First Comp. Dec. in case of Adrian B. Owens, Copp's Pub. Land Laws, 1890, vol. 2, p. 1238.)

38. Mortgagees are not assignees within the meaning of the repayment laws, but may become such by pursuing the course suited to the particular case as follows:

(a) Where, after date of entry and prior to cancellation thereof, the land is mortgaged and the mortgagee receives a sheriff's deed under foreclosure proceedings, the mortgagee becomes an assignee. (See 193 U. S., 651; 28 L. D., 201, and 30 L. D., 136.)

(b) Where a mortgage is executed prior to the cancellation of an entry, and a deed made to the mortgagee after such cancellation, the holder of such deed becomes the assignee. (See 26 L. D., 425.)

39. In either case, complete evidence must be furnished to establish the applicant's right to repayment by producing the original deeds or instruments, or certified copies thereof showing all transactions, together with certified copies of the court proceedings.

DOUBLE-MINIMUM EXCESS.

40. The last clause of the second section of the act provides that "in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of \$1.25 per acre shall in like manner be repaid to the purchaser thereof or to the heirs or assigns."

41. This clause has been practically absorbed by section 2 of the act of March 26, 1908. (Instructions following.)

42. The applicant must make the affidavit showing that he is the identical party who made the entry on which repayment is claimed, as contained in the form of application.

43. Repayment of double-minimum excess will be made only to the original entryman, his heirs or assigns. The sale and transfer of the land is not of itself treated as an assignment of the right to receive repayment of double-minimum excess.

ACT OF MARCH 26, 1908.

44. The act of March 26, 1908 (35 Stat., 48) provides for the repayment of certain commissions, excess payments, and purchase moneys paid under the public land laws and is additional to the provisions of sections 2362 and 2363, United States Revised Statutes, and to the act of June 16, 1880 (*supra*).

45. The first section of this act authorizes the return to the applicant, or his legal representatives, of purchase moneys and commissions covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, where such application has been or shall hereafter be rejected, in cases where neither the applicant nor his or her legal representatives shall have been guilty of any fraud or attempted fraud in connection with said application.

46. This section refers more particularly to moneys covered into the Treasury of the United States which were paid in connection with rejected applications to make entry, proof, etc., but it also contemplates the repayment of moneys paid in connection with allowed entries and proofs, which entries or proofs should have been rejected. (See 43 L. D., 104.)

47. The second section authorizes the return to the person who made the payment, or to his legal representatives, of any moneys paid under any of the land laws of the United States, in excess of the legal requirements.

LEGAL REPRESENTATIVES.

48. The term "legal representatives" includes heirs, executors, and administrators, and where application is made by either of them due proof must be furnished as required by paragraphs Nos. 29 or 30, as the case may be.

49. Assignees also come within the purview of this term, but only in such instances as would not be repugnant to section 3477, United States Revised Statutes.

50. Where applications are made by assignees, the evidence required under paragraphs Nos. 31 or 32, as the case may be, must be furnished.

51. Section 3477, United States Revised Statutes, prohibits the transfer or assignment of claims against the United States, and therefore any attempted transfer or assignment of a claim under either of the before-mentioned sections can not be recognized, except in certain cases, coming under section 1 of this act. (See 42 L. D., 181.)

52. The instances in which assignees are authorized to receive repayment under this act would be in cases where entries are allowed, but which should have been rejected, and after the date of such entries and prior to the cancellation thereof, valid attempts are made to transfer the lands entered; and further, in cases where proofs and payments are made, but certificates of entry withheld, and thereafter valid assignments are made of all right, title, and interest in and to the lands involved. (43 L. D., 477; and 44 L. D., 516.)

DEFINITION OF "ERRONEOUSLY ALLOWED."

53. This phrase, being the basis for the allowance of repayment under section 2 of the act of June 16, 1880 (*supra*); can not be given an interpretation of such latitude as would countenance fraud. If the records of the Land Office, or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be "erroneously allowed." But if a tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was "erroneously allowed"; and in such case repayment would not be authorized.

FRAUD OR ATTEMPTED FRAUD.

54. What constitutes "fraud or attempted fraud" within the meaning of section 1 of the act of March 26, 1908 (*supra*), such as will bar repayment, affords a wide degree of latitude, and it necessarily follows that each claim for repayment must be adjudicated upon a finding of the record in the case.

TRANSMITTAL OF APPLICATIONS.

55. Applications for repayment may be filed either in this office or in the proper district land office.

56. When an application is filed in the district land office the register and receiver shall transmit the same with a full report of the facts in the case, as shown by their official records, and recommend either the allowance or the disallowance of the claim.

57. Where an application is filed, either in the district land office or in this office, it should be accompanied by a statement by the applicant setting forth fully the grounds upon which repayment is claimed.

CREDIT FOR PRIOR PAYMENT UPON SECOND PROOF.

58. In cases where the commutation homestead proof, final homestead proof, final desert-land proof, or other proof based upon an original entry, upon which you have issued certificate, has been rejected by this office, the certificate canceled, and the original entry allowed to stand subject to future compliance with the law, if second proof is accepted, credit may be allowed for the money paid on the first proof, and the register will issue his certificate, bearing proper number and date, making notation thereon in accordance with paragraph 195, Circular No. 105, dated May 4, 1912.

59. The entryman is required to pay the testimony fees in connection with the second proof, irrespective of the fees paid with the first proof, which fees are to be accounted for in accordance with instructions contained in said Circular No. 105.

60. If the entire entry is canceled and the entryman is allowed to begin proceedings *de novo*, as for instance, in a mineral entry, the purchase money paid upon the first entry can not be applied in payment for a second entry. The only relief that may be afforded, if any, will be upon application for repayment.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

Bo SWEENEY,
Acting Secretary,

THE LAWS GOVERNING REPAYMENTS.

No money shall be drawn from the Treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. (Sec. 9, art. 1, Constitution of the United States.)

REVISED STATUTES OF THE UNITED STATES.

SEC. 2362. The Secretary of the Interior is authorized, upon proof being made to his satisfaction that any tract of land has been erroneously sold by the United States, so that from any cause the sale can not be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

SEC. 2363. Where any tract of land has been erroneously sold, as described in the preceding section, and the money which was paid for the same has been invested in any stocks held in trust, or has been paid into the Treasury to the credit of any trust fund, it is lawful, by the sale of such portion of the stocks as may be necessary for the purpose, or out of such trust fund, to repay the purchase money to the parties entitled thereto.

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

ACT OF JUNE 16, 1880 (21 STAT., 287).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where it shall, upon due proof being made, appear to the satisfac-

tion of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled "An act to amend an act entitled 'An act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States,' and amendments thereto," approved March third, eighteen hundred and seventy-three, and now incorporated in section twenty-three hundred and six of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon canceled, the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase money on lands erroneously sold by the United States.

SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns.

SEC. 3. The Secretary of the Interior is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

SEC. 4. The Commissioner of the General Land Office shall make all necessary rules and issue all necessary instructions to carry the provisions of this act into effect; and for the repayment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury and the same shall be paid without regard to the date of cancellation of the entries.

ACT OF MARCH 26, 1908 (35 STAT., 48).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected and neither such

applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

SEC. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

SEC. 3. That when the Commissioner of the General Land Office shall ascertain the amount of any excess moneys, purchase moneys, or commissions in any case where repayment is authorized by this statute, the Secretary of the Interior shall at once certify such amounts to the Secretary of the Treasury, who is hereby authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and issue his warrant in settlement thereof.

AMBROSE H. SMITH.

Decided November 2, 1916.

REPAYMENT—ROSEBUD INDIAN LANDS—COMMUTATION—PURCHASE PRICE.

The provision of Rule 46 of the Rules of Practice that an entryman may submit final proof during the pendency and after trial of a contest against the entry and complete the same "with the exception of payment of the purchase money or commissions," is applicable to entries of surplus or unallotted Rosebud Indian lands under the act of March 2, 1907; and where the local officers erroneously required an entryman of such lands who submitted commutation proof under section 3 of the act of March 2, 1907, to make payment of the balance of the purchase price, contrary to the provisions of Rule 46, the entryman is entitled, upon cancellation of the entry as result of the contest, to repayment of such balance, as excess payment, under the provisions of the act of March 26, 1908.

SWEENEY, Assistant Secretary:

The Department has reconsidered the above entitled case in the light of the contentions presented by the petition for the exercise of supervisory authority filed with the Commissioner of the General Land Office and by him transmitted to the Department with favorable recommendation.

It appears that on October 4, 1909, Ambrose H. Smith made homestead entry 01508, under the act of March 2, 1907 (34 Stat., 1230), for the SE. $\frac{1}{4}$, Sec. 29, T. 101 N., R. 77 W., 5th P. M., Gregory, South Dakota, land district.

June 15, 1910, one H. Julia Davis filed contest affidavit against said entry alleging in substance that Smith had not established *bona fide* residence on the land. Notice was served on the defendant

and on answer having been filed a hearing was had before the local officers January 24, 1911. The register and receiver by decision on May 11, 1912, found that the charges were sustained, and on appeal the Commissioner, in affirming the decision of the local officers, held that "defendant never established a *bona fide* residence on said land until after he had notice of the pendency of this contest." The Commissioner's decision became final and on May 23, 1913, Smith's entry was canceled.

When Smith made the entry under consideration, October 4, 1909, he paid the necessary fee and commissions, amounting to \$14, and in addition thereto \$192 as first installment of the purchase money, the balance to be paid in five equal annual installments as fixed by the act hereinbefore cited, and regulations thereunder governing the sale of the surplus or unallotted lands in the Rosebud Indian Reservation (37 L. D., 124).

The record discloses that upon the contest proceedings initiated by Davis, and in connection with which hearing was held January 24, 1911, the local officers, for some reason not disclosed by the record, did not render decision until May 11, 1912. In the meantime Smith, taking advantage of the first proviso to section 3 of the act of March 2, 1907, *supra*, submitted commutation proof to the local officers, on July 5, 1911, which proof was rejected on the ground that "no money has been received to cover balance due, interest and commissions and testimony fees." In pursuance of the local officers' demand that the full purchase price be paid within thirty days from their notice, and in order to protect his rights under the act of March 2, 1907, *supra*, as construed by the local officers, Smith, on August 24, 1911, paid the balance of the commutation price, \$768, together with interest and commissions. The commissions were carried in the receiver's unearned account and subsequently returned to claimant.

Thereupon, after receiving the purchase price in full, the register and receiver, by notice to claimant under date of September 6, 1911, did what they should have done in the first instance, namely, suspended the proof on the ground that "no reason is given in the proof why same was not submitted on the day advertised; also that contest No. 1445 is pending involving this entry."

Rule of Practice 46, as then in force, provided that:

Where trial of a contest brought against any entry or filing has taken place, the entryman may submit final proof and complete the same, with the exception of payment of the purchase money or commissions, as the case may be; such final proof will be retained in the local office, and, should the entry be adjudged valid, will, if satisfactory, be accepted upon payment of the purchase money or

commissions, and final certificate will issue without further action on the part of the entryman, except the furnishing by him, or in case of his death by his legal representatives, of nonalienation affidavit.

In such cases the party making the proof will at the time of submitting same be required to pay the fees for reducing the testimony to writing.

The proviso to section 3 of the act of March 2, 1907, *supra*, under which this particular entry was commuted, is as follows:

Nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered.

The practice as laid down in the Rules of Practice should have been followed in this case, notwithstanding the lands entered were surplus or unallotted Rosebud Indian lands. Nothing in the act of March 2, 1907, *supra*, can be fairly construed as a modification of the rule of the Department as to proofs and payments pending contest, a rule founded upon considerations of justice and fair dealing. The local officers, therefore, should not have required payment of the balance of the purchase money.

When repayment was denied in the case by the Commissioner of the General Land Office February 11, 1915, and also the Department on appeal April 29, 1915, the issue now presented was not raised—namely, whether or not the local officers properly required claimant to pay the balance due in connection with the proof submitted on an entry against which there was a pending contest.

The Department, upon reconsideration of the case, finds that the first payment, made October 4, 1909, consisting of \$192 first installment of purchase money and \$14 fees and commissions, was proper and no authority of law exists for the return of any portion thereof, the same having been forfeited through claimant's failure to comply with the requirements of the act under which the entry was made.

The balance of the purchase price, paid August 24, 1911, amounting to \$768, was erroneously required and collected and, therefore, constitutes a payment in excess of the legal requirements, properly returnable under section 2 of the act of March 26, 1908 (35 Stat., 48).

The petition is accordingly granted, the prior departmental decision rendered herein vacated and the papers in the case returned with direction that a repayment account be stated and submitted for approval in accordance with the views herein expressed.

MINING LOCATIONS ON SHOSHONE OR WIND RIVER LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, November 10, 1916.

REGISTER AND RECEIVER,

United States Land Office, Lander, Wyoming.

SIRS: Section 2 of the act of March 3, 1905 (33 Stat., 1016), providing for the disposition of lands within the ceded portion of the former Shoshone or Wind River Indian Reservation, in the State of Wyoming, under the provisions of the homestead, town site, coal and mineral land laws of the United States, provides, among other things, that—

Notice of location of all mineral entries shall be filed in the local land office of the district in which the lands covered by the location are situated.

The act of Congress approved August 21, 1916 (39 Stat., 519), provides—

That the Secretary of the Interior is authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of said reservation, under such terms and conditions as shall be by him prescribed.

Said latter act operated as a repeal of the general mining laws, in so far as they were applicable to lands containing deposits of oil and gas within the area above mentioned, and deposits of oil and natural gas within said area are subject only to lease under said act of August 21, 1916, under such terms and conditions as the Department may prescribe.

Accordingly, you will not receive or file a notice of mineral location for oil or natural gas deposits in any case where the notice of location purports to be based upon a claim and a discovery and location of deposits of oil and natural gas, within said area, made from and after August 21, 1916. All such notices should be returned to the parties filing same and their attention should be called to these instructions.

Very respectfully,

C. M. BRUCE,

Acting Commissioner.

Approved, November 10, 1916:

Bo SWEENEY,

Acting Secretary.

TURTLE MOUNTAIN INDIANS—ALLOTMENT SELECTIONS ON PUBLIC DOMAIN.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, November 10, 1916.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: It has been brought to the attention of the Department that considerable confusion exists in the minds of many people who are endeavoring to make entry of lands which they believe have been restored to entry by virtue of the decision of the Department in the case of *Peter J. Voight v. Josephine Bruce* (44 L. D., 524), which held that certain Turtle Mountain selections were illegal. These persons are settling on lands embraced in such selections without regard to whether trust patents have been issued upon the same, or whether the selectors were born before or after October 8, 1904, the date when the tribe ratified the provisions contained in the act of April 21, 1904 (33 Stat., 189, 194), which ratification was required under the terms of the act before the same became effective. Applications are also being filed for lands embraced in Turtle Mountain selections, and to contest such selections without regard to the circumstances of the case.

The mistaken impression has prevailed in some quarters that the said decision held all selections filed after October 8, 1904, to be illegal, whereas it had reference only to those made for children born after that date, the time of filing of selections for children born on or before October 8, 1904, being immaterial.

No contests will be allowed against Turtle Mountain selections whether patented or not where the same are based on charges of illegality growing out of said decision (*Voight v. Bruce*) as the facts of the illegality, if the same exists, are shown on the records in the General Land Office and in the Indian Office, and no additional information can be furnished by a contestant. Moreover, as the successful contestant of an Indian allotment gains no preference right of entry, the contest would avail him nothing. The selection will be canceled in due course and the land will become subject to disposition.

As all Turtle Mountain selections were required to have filed therewith certificates from the officer of the Indian Service charged with that duty that the selector was a member of the Turtle Mountain tribe of Chippewa Indians entitled to a selection of land, under the construction of the Turtle Mountain act then prevailing, before

the allowance of the same by the local land officers, they are regarded after such allowance as segregating the lands covered thereby. Such lands, therefore, are not subject to entry or settlement until after the selections have been noted as canceled on the records of the local land office, and no rights can be regarded as initiated by the tender of an application for a tract embraced in such a selection until after such notation has been made (29 L. D., 29), (32 L. D., 102), (34 L. D., 12), (207 U. S., 407).

You will endeavor to have the facts stated in this letter brought to the general notice of the public in so far as the same can be done without expense to the Government.

Very respectfully,

C. M. BRUCE,
Acting Commissioner.

Approved, November 10, 1916:

Bo SWEENEY,
Assistant Secretary.

CAREY ACT—ELIMINATIONS FROM APPLICATIONS FOR SEGREGATION OR WITHDRAWAL.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

Washington, November 23, 1916.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

DEAR MR. COMMISSIONER: I am in receipt of your letter of October 17, 1916, transmitting for consideration proposed new rules to govern eliminations from applications for segregations under the Carey Act (28 Stat., 372), the withdrawal act of March 15, 1910 (36 Stat., 237), and from applications for segregation or withdrawal.

I do not agree with the conclusion reached in your paper, either from the administrative or legal standpoint. Administratively, I believe proposed rule 1 would lead to confusion and possible hardship and suffering to settlers and applicants, and in cases where segregations are finally allowed might embarrass the disposition of the land under the Carey Act. The general rule of the Department, as laid down in numerous decisions, and approved by the Supreme Court in case of *Holt v. Murphy* (207 U. S., 407), is to the effect that the Secretary of the Interior is fully justified in ruling that no applications will be received nor any rights recognized by the tender of an application for land embraced in selections and entries of record until same have been canceled upon the records of the local land office. The reason for such a rule is equally forcible with

respect to lands applied for or segregated under the so-called Carey Act or acts supplemental thereto. The act first mentioned provides that the Secretary of the Interior—

may make necessary regulations for the reservation of the lands applied for by the States, to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved.

It is argued that under this provision of law lands covered by an application for segregation are subject to settlement and to application for entry until actual segregation of the lands is ordered by the Secretary of the Interior, whereupon such settlements and applications are defeated, but that if the application for segregation shall be finally denied, the subsequently initiated claims are valid.

As indicated, this, in my opinion, is not good administration, either from the standpoint of the Government or the people, and I am not convinced that the act of 1894, *supra*, necessarily bears out the construction indicated. It provides that the reservation shall be of no force if the application for segregation be not approved, but it also provides that the Secretary may make necessary regulations for the reservation of the lands, to date from the filing of the application, thereby vesting in the Secretary administrative discretion and authority with respect to withdrawal of the lands pending consideration and disposition of the State's application.

Be that as it may, the question appears to be disposed of by the subsequent legislation of September 30, 1913 (38 Stat., 113-114), providing a method for the opening and restoration of withdrawn or reserved lands. Section 1 deals with such reservations as are to be vacated and set aside by the President and vests in him broad discretion as to the time and manner of restoration, in order that good administration may be maintained and equal opportunity afforded the general public. Section 2 of the act is to the effect that—

where under the law the Secretary of the Interior is authorized or directed to make restoration of lands previously withdrawn, he may also restrict the restoration.

If, therefore, authority for restricting the disposition of lands reserved or withdrawn in connection with applications and segregations under the Carey Act be not found in the Carey Act itself, it is to be found in the act just cited. I therefore hereby establish the following rules and regulations governing lands covered by applications for segregation under the act of August 18, 1894, segregations made under said act, and withdrawals under the act of March 15, 1910, *supra*, while pending and when eliminated or restored:

1. Lands embraced in pending applications filed by States under the act of August 18, 1894 (28 Stat., 422), and described in accom-

panying maps and plans of irrigation; lands withdrawn under the act of March 15, 1910 (36 Stat., 237); and lands covered by approved segregations under the act of August 18, 1894, *supra*, are not subject to settlement, application, entry, or other filings while reserved, withdrawn, or segregated, and applications to file, select, or enter tendered shall be rejected by the register and receiver.

2. Upon rejection of an application for segregation under the Carey Act, or upon elimination of lands from a segregation or a withdrawal under the act of March 15, 1910, such lands, not otherwise withdrawn, reserved, or appropriated, shall be restored to entry under the homestead laws only on a future day fixed or appointed, and to entry, filing, or selection generally on a subsequently fixed or appointed day. Applications may be filed under the regulations of May 22, 1914 (Circular 324, 43 L. D., 254), twenty days before the land becomes subject to entry, filing, or selection contemplated. All applications under the homestead laws under Circular 324 shall be treated as simultaneously filed on the date the land becomes subject to entry thereunder.

Prior regulations, in so far as they may conflict herewith, are hereby revoked.

Very truly yours,

ALEXANDER T. VOGELSANG.

PAPAGO INDIAN RESERVATION—MINERAL LANDS.

REGULATIONS.

Washington, D. C., March 27, 1916.

The HONORABLE

The SECRETARY OF THE INTERIOR.

(Through the Commissioner of the General Land Office.)

SIR: I invite your attention to Executive Order No. 2300, signed by the President on January 14, 1916, withdrawing certain described lands in southern Arizona for the use and occupancy of the Papago Indians, and particularly to the concluding paragraph of said order, which reads:

The foregoing reservation is hereby created with the understanding that it shall not interfere with prospecting for minerals, under such rules and regulations as the Secretary of the Interior may prescribe, or the filing of entries in accordance with the mineral land laws of the United States: And further, That nothing contained herein shall affect any existing legal right of any person to any of the lands herein described.

In connection with this matter there is enclosed a letter dated March 1, 1916, from the Commissioner of the General Land Office,

concerning the disposition of lands in the withdrawn area under the mineral land laws and the possible need (from an Indian standpoint) of regulations to govern prospecting for minerals.

I have examined carefully the existing regulations pertaining to mineral lands on the public domain for the purpose of ascertaining whether such regulations are applicable to the Papago reservation, and I believe that they may well be applied to the reservation, provided opportunity is given the Indian Office to investigate all applications for mill sites, in order that proper protection may be afforded the Indians in connection with their water rights.

The Commissioner of the General Land Office has expressed a willingness to advise this office of all applications and entries for mining claims covering lands within the Indian reservation, in order that the Indian Office may investigate the *bona fides* of mineral claimants prior to the issuance of patent. If this course is followed, of which I approve, and in addition, the suggestion as to mill sites observed, I believe that ample protection will be given the Indians in the occupation and use of their nonmineral lands. Under the mining laws and regulations, applications for mill sites may cover lands not mineral and not necessarily contiguous to mineral lands.

I therefore recommend that the mining regulations of August 6, 1915 (44 L. D., 247), be considered as applicable to lands within the Papago reservation, established by Executive Order of January 14, 1916, with the above modifications.

Very respectfully,

CATO SELLS, *Commissioner*.

GENERAL LAND OFFICE,

Washington, D. C., April 1, 1916.

I concur in the recommendation of the Commissioner of Indian Affairs.

CLAY TALLMAN, *Commissioner*.

Approved as recommended, April 19, 1916:

ANDRIEUS A. JONES,

First Assistant Secretary.

PAPAGO INDIAN RESERVATION—NOTICE OF MINERAL APPLICATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, December 5, 1916.

REGISTER AND RECEIVER,

Phoenix, Arizona.

CHIEF OF FIELD DIVISION,

Santa Fe, New Mexico.

SUPERINTENDENT OF SAN XAVIER INDIAN SCHOOL,

Tucson, Arizona.

SIRS: The Executive Order of January 14, 1916, withdrawing and setting apart as a reservation for the Papago Indians certain lands in the State of Arizona, provides that:

The foregoing reservation is hereby created with the understanding that it shall not interfere with the prospecting for minerals under such rules and regulations as the Secretary of the Interior may prescribe or the filing of entries in accordance with the mineral laws of the United States.

1. Hereafter in all cases of application for patent under mineral land laws for lands included in said reservation, the register and receiver will forward a copy of notice of applications to the superintendent of the San Xavier Indian School at Tucson, Arizona, or to such other officer of the Indian Service as may have at the time supervision over said lands.

2. The register and receiver will also forward a copy of said notice of application to the Chief of Field Division at Santa Fe, New Mexico, endorsing thereon, "Within Papago Indian Reservation."

3. The Superintendent of the San Xavier Indian School and the Chief of Field Division will in every case return the copy of notice prior to date for final proof.

4. When the two copies of the notice are returned with an endorsement stating no investigation necessary, the register and receiver will act upon the merits of the proof as submitted. Where the returned endorsement of either the Superintendent or the Chief of Field Division states investigation will be made, the register and receiver will act on the merits of the proof, and, if found regular, issue final certificate and advise the claimant that patent will be withheld by the General Land Office pending report by the Superintendent of the San Xavier Indian School or the Chief of Field Division, as the case may be, on the *bona fides* of the claim. See circular October 30, 1913 (42 L. D., 474).

5. In any case where final certificate is issued and investigation is to be made, the register and receiver will forward with the record a

copy of their letter notifying the party that patent will be withheld until report has been submitted.

Very respectfully,

CLAY TALLMAN,
Commissioner of the General Land Office.

CATO SELLS,
Commissioner of Indian Affairs.

Approved, December 11, 1916:

ALEXANDER T. VOGELSANG, *First Assistant Secretary.*

PAPAGO INDIAN RESERVATION—NOTICE OF MINERAL APPLICATIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, December 5, 1916.

CHIEF OF FIELD DIVISION,
Santa Fe, New Mexico.

SUPERINTENDENT OF SAN XAVIER INDIAN SCHOOL,
Tucson, Arizona.

SIRS: By circular letter of even date, addressed to the Register and Receiver, Phoenix, Arizona, and to each of you, the Register and Receiver have been directed to forward to each of you a copy of notice of all mineral applications for lands included in the Papago Indian Reservation by Executive Order of January 15, 1916. In addition to the instructions given to you in said circular letter, the following additional instructions are issued for your guidance:

1. All reports on investigations made by the Superintendent, whether favorable or adverse, will be transmitted in duplicate directly to the Chief of Field Division at Santa Fe, New Mexico. The Superintendent will also transmit a copy of his report to the Commissioner of Indian Affairs.

2. The Chief of Field Division will consider the reports submitted to him by the Superintendent and make such further investigation as he deems necessary and thereafter make report to the Commissioner of the General Land Office with appropriate recommendation as in other classes of cases, forwarding with his report copy of report of the Superintendent.

Very respectfully,

CLAY TALLMAN,
Commissioner of the General Land Office.

CATO SELLS,
Commissioner of Indian Affairs.

Approved, December 11, 1916:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

RECLAMATION—WATER RIGHTS—CORPORATIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, September 26, 1916.

The SECRETARY OF THE INTERIOR.

SIR: On July 11, 1913 (42 L. D., 250), the Secretary decided that under the reclamation law water right applications should not be made by corporations. The text of the letter of the Department would apply to any corporation, but it is thought that the spirit of the Secretary's letter would permit a ruling allowing water right applications to be made by religious, educational, charitable or eleemosynary corporations not organized or managed for private profit.

In his letter of July 11, 1913, the Secretary says:

I am satisfied that Congress did not intend that these reclaimed lands upon which the Government is expending the money of all the people should be the subject of corporate control. These lands are to be the homes of families.

Religious, educational, charitable and eleemosynary corporations owning land on reclamation projects frequently desire to obtain a water right for their lands, and it is believed that the Department would act in accordance with a wise public policy in authorizing the sale of a water right to such corporations, when not organized or managed for private profit, subject of course to the usual restrictions of the reclamation laws as to furnishing water to lands in private ownership. Corporations of the kinds listed above contribute greatly to the moral and material betterment of the families on reclamation projects.

It is recommended that the Department authorize the execution of water right applications by religious, educational, charitable and eleemosynary institutions owning lands on reclamation projects, when such corporations are not organized or managed for private profit.

Respectfully,

WILL R. KING,
Acting Director.

Recommendation approved, December 5, 1916:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

WILLIAM H. WHITTEN.

Decided March 22, 1916.

NATIONAL FOREST LANDS—HOMESTEAD APPLICATION FOLLOWING CANCELLATION OF PATENT.

Upon cancellation, on the ground of fraud, of patent to lands within the exterior limits of a national forest, entry thereof having been made prior to the creation of the forest, such lands become part of the forest and are not subject to entry as unreserved public land.

JONES, *First Assistant Secretary*:

William H. Whitten appealed from the decision of October 25, 1915, rejecting his homestead application for the NW. $\frac{1}{4}$, Sec. 20, T. 14 S., R. 3 W., W. M., Roseburg, Oregon, on the ground that the land had been patented by the United States, and was not subject to entry.

March 30, 1915, Whitten filed homestead application, which the local office rejected because the land had been patented to S. A. D. Puter, and because the land was withdrawn by Executive order of August 13, 1912. The Commissioner affirmed that action. These facts are not disputed, but counsel for claimant argued that as, by decision of the Supreme Court of the United States in *Linn & Lane Timber Company v. United States* (236 U. S., 574), the patent was canceled, such judgment effected, on the date of its rendition (March 8, 1915), a revestiture of title in the United States, and the land is therefore subject to entry. It is insisted that as title was outstanding at the date of the Executive order, the reservation could have no effect upon it. This contention is not well founded.

The Executive order was made August 13, 1912, at a time when the United States was asserting its rights arising from Puter's fraud in acquiring title. When cancellation of the outstanding legal title was effected, the title so reacquired related back to the date when the legal title was lost, revesting the United States as perfect uninterrupted title as it had at inception of the fraud. The judgment, in effect, established the fact that the patent was never intelligently made, and an equitable title remained in the United States because of the fraud practiced by the grantee upon the United States. The equitable title, in fact, was never out of the United States. That is established by the decree.

An order of reservation operates upon the equitable as well as the legal rights of the United States in the land, and when the legal right is subsequently canceled, the order of reservation, which had been made while legal title was outstanding, is effective, for the complete title is merely reunited where the equitable title was all the time. The decision is affirmed.

STATE OF OKLAHOMA.

Decided April 24, 1916.

STATES AND TERRITORIES—GRANTS FOR EDUCATION—ACTS OF JULY 2, 1862 (12 STAT., 503), AND JULY 23, 1866 (14 STAT., 208), CONSTRUED.

As to new States, not entitled to representation in Congress by the apportionment under the census of 1860, the amendment (Act of July 23, 1866, 14 Stat., 208), to the Act of July 2, 1862 (12 Stat., 503), granting lands to the States, for the purposes of education, upon their admission to the Union, was intended by Congress as a pledge, and is ineffectual as a grant without further legislation.

JONES, *First Assistant Secretary*:

The State of Oklahoma applied to enter 5,760 acres of land in the Guthrie, Lawton, and El Reno land districts, under the acts of July 2, 1862 (12 Stat., 503), and July 23, 1866 (14 Stat., 208), and thereafter, on the 24th day of October, 1910, filed direct with the Commissioner of the General Land Office application for the issuance of land scrip under said acts, in the amount of 204,240 acres—

being the deficiency of its distributive share after the State has applied to enter and file upon all vacant, unoccupied public lands in the State of Oklahoma which are subject to entry under the acts above mentioned.

The Commissioner rejected the latter application, by decision of November 28, 1910, and from this decision the State has appealed.

The act of July 2, 1862, *supra*, provides in part as follows:

That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty. * * * That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned and from the sale of land scrip hereinafter provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts.

By the act of February 14, 1864 (13 Stat., 47), the time for the acceptance of the provisions of the act of 1862 was extended, and it is provided "That any State or Territory may accept and shall be entitled to the benefits of the act" of 1862.

Although the caption of the act of 1862 refers to lands donated to Territories as well as States, and notwithstanding the provisions of

the act of 1864, the grant was not construed by the General Land Office to have been made to Territories. See Memorial of the Assembly of Washington Territory to Congress, dated December 21, 1865, which appears on page 1875 of the Congressional Globe, 39th Congress, 1st Session.

The act of 1862 was amended by the act of July 23, 1866, *supra*, which is in part as follows:

That when any Territory shall become a State and be admitted into the Union, such new State shall be entitled to the benefits of the said act of July two, eighteen hundred and sixty-two, by expressing the acceptance therein required within three years from the date of its admission into the Union, and providing the college or colleges within five years after such acceptance, as prescribed in this act: * * *

By act of March 2, 1887 (24 Stat., 440), appropriation was made for the benefit of agricultural experiment stations which might be established in connection with agricultural and mechanical colleges established under the act of 1862. And by act of August 30, 1890 (26 Stat., 417), certain additional appropriations were made "for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts," established in accordance with the act of 1862; such appropriation to be paid upon certificate of the Secretary of the Interior as to each State and Territory entitled to receive same.

Oklahoma, by Senate Joint Resolution No. 3, approved February 23, 1910, accepted the provisions of the act of 1862, as amended, and obligated itself to comply therewith, and now contends that it is entitled to receive, under the acts of 1862-66, 30,000 acres of land for each of its Senators and Representatives in Congress at the time of its admission to the Union.

Reading together those parts of the acts of 1862 and 1866 which are important in the consideration of this case, the same provide that when any Territory shall become a State and be admitted to the Union, there be granted to such new State an amount of public land, to be apportioned to it, equal to 30,000 acres for each Senator and Representative in Congress to which such new State is entitled by the apportionment under the census of 1860. No other measure of the grant is prescribed, and as Oklahoma was not entitled to representation in Congress by the apportionment under the census of 1860, it is impossible for this Department to say how many acres it is entitled to receive, without reading into the act something that is not there, and reading out of the same something that is there.

Each new State admitted to the Union since the passage of the act of 1862, that has received the benefits of that act, has received the same by subsequent legislation prescribing the number of acres to which it was entitled. Such action by Congress is tantamount to a legislative

construction of the acts under consideration as a pledge and not a grant to new States not entitled to representation in Congress by the apportionment under the census of 1860, and demonstrates beyond doubt the necessity of further legislation in order to determine the number of acres such States are entitled to receive.

This clearly appears from the act for the admission of Colorado, and the subsequent act by which it secured the benefits of the act of 1862. Colorado was the first State to be admitted to the Union pursuant to an act passed subsequent to the amendment of 1866. The enabling act of the State was passed March 3, 1875 (18 Stat., 474), by which grants of land were made to the State for the support of common schools, State university, and other purposes, but no grant was made for agricultural and mechanical college purposes; nor did the act contain any reference to the acts of 1862-66, nor make any grant in lieu of the benefits thereof, nor contain a general provision, similar to that found in other enabling acts, except for Oklahoma, that the State should not be entitled to any further or other grant of land for any purposes than as expressly provided therein. Colorado duly accepted the provisions of the act of 1862, as amended, by legislative enactment approved January 27, 1879 (S. L., 1875, p. 174), but received the benefits thereof by act of April 2, 1884 (23 Stat., 10), which, including the caption, is as follows:

An act to enable the State of Colorado to take lands in lieu of the sixteenth and thirty-sixth sections found to be mineral lands, and to secure to the State of Colorado the benefit of the act of July second, eighteen hundred and sixty-two, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts." * * *

SEC. 3. That the State of Colorado, in selecting lands for agricultural-college purposes under the acts of July second, eighteen hundred and sixty-four, and July twenty-third, eighteen hundred and sixty-six, may select an amount of land equal to thirty thousand acres for each Senator and Representative which said State is entitled to in Congress, from any public land in said State not double-minimum priced land; or selections may be made from said double-minimum lands, but in the latter case the lands are to be computed at the maximum price and the number of acres proportionally diminished; but no mineral lands shall be selected.

The only new matter contained in section 3 of this act is the declaration of the number of acres to which Colorado was entitled under the acts of 1862-66; and, since its enabling act did not exclude it from the benefits of said acts, the provisions of which were duly accepted by the State, this is the sole and only purpose of said section, which was enacted, as stated in the caption, "to secure to the State" the benefits of the act of 1862.

In this connection, it is important to note that the grant of land for internal improvements made to new States by section 8 of the act

of September 4, 1841 (5 Stat., 453), which definitely specified the number of acres new States were entitled to receive, was self-operative, and Colorado received the benefits thereof without further legislation.

Between the dates of the passage of the original act of 1862 and the amendatory act of 1866, enabling acts were passed providing for the admission of the States of West Virginia, December 31, 1862 (12 Stat., 633) which never occupied the status of a Territory; Nevada, March 21, 1864 (13 Stat., 30); Nebraska, April 19, 1864 (13 Stat., 47). West Virginia was given the benefits of the act of 1862 on April 14, 1864 (13 Stat., 47), Nevada, by act of July 4, 1866 (14 Stat., 85), and Nebraska, by the act of March 30, 1867 (15 Stat., 13), the latter's grant of land having been made by the act of 1864.

North Dakota, South Dakota, Montana and Washington were admitted pursuant to act of February 22, 1889 (25 Stat., 676), section 16 of which prescribed the number of acres these States were entitled to receive under the act of 1862. Said section is as follows:

That ninety thousand acres of land, to be selected and located as provided in section ten of this act, are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations of lands for such purpose.

The acts of Congress referred to are those of 1862 and 1866. Opposite this reference is printed in small type: "vol. 12, p. 503," which is the volume and page of the Statutes at Large containing the act of 1862.

The same is true of Idaho (see Sec. 10 of the act of July 3, 1890, 26 Stat., 215); and Wyoming (see Sec. 10 of the act of July 10, 1890, 26 Stat., 224). The Supreme Court of the United States, in the case of Wyoming Agriculture College v. Irvine (206 U. S., 278), held that the grant to Wyoming of 90,000 acres, by section 10 of the act last mentioned, was pursuant to the act of 1862.

The act of July 16, 1894 (28 Stat., 107), for the admission of Utah, is worded somewhat differently from the other acts. Section 8 provides that in addition to certain other lands granted to the State, there shall be granted to it—

one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all saline lands in said State * * * for the use of the said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said State, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.

While no reference is made to the fact that this grant is in accordance with previous acts of Congress, the grant of 200,000 acres is

made for the same purpose as provided in the act of 1862, and, as provided in that act, the proceeds of the whole of the granted lands are to constitute a permanent fund, the *income* thereof to be used exclusively for the purposes of such agricultural college.

There is no doubt that this grant was made in fulfillment of the pledge contained in the acts of 1862-66; and that it was so understood and received by the State of Utah clearly appears from the catalogue of the agricultural college of that State for 1901-1902, wherein, under the head of "Foundation and Endowment," the act of July 2, 1862, is referred to as the act by which the college was founded; and, in speaking of the endowment thereof, the grant of 200,000 acres of land is referred to as having been made under the aforesaid act.

In making grants of land to agricultural and mechanical colleges in new States, under the acts of 1862-66, Congress has not adopted any uniform rule with reference to the number of acres such States were entitled to receive. South Dakota, while entitled to two Senators and two Representatives in Congress at the time of its admission to the Union, received 160,000 acres for agricultural and mechanical college purposes; and Montana, which was entitled to two Senators and one Representative, received 140,000 acres. (Secs. 17 and 19, act of February 22, 1889), *supra*. Utah was entitled to two Senators and one Representative, but, as has been seen, received 200,000 acres, pursuant to the acts of 1862-66.

It is argued on behalf of the State of Oklahoma that to place a different construction upon the act of 1866 from that contended for, would be to hold that Congress did a vain and useless thing when it extended the provisions of the act of 1862 to new States. This would by no means follow, as it must be remembered that the census of 1860 continued to be the guide under which the apportionment of representatives in Congress was made, for some years after the passage of the act of 1866, and new States admitted thereafter might have been entitled to representation in Congress by the apportionment under the census of 1860, in which event they would receive the benefits of the grant—the number of acres being readily ascertainable—in the absence of legislation to the contrary (Sec. 20, Revised Statutes).

On the whole it would appear that, as to new States, not entitled to representation in Congress by the apportionment under the census of 1860, the amendment of 1866 was intended by Congress as a pledge, and is ineffectual as a grant, without further legislation. This theory is supported by the debate on the bill in the House of Representatives, which appears on pp. 1897-98-99, of the Congressional Globe, 39th

Congress, 1st Session. Representative Kasson, speaking in opposition to the provision with reference to new States, said:

I think it would be better that the grant should be made in the usual way. This bill proposes to allow three years for the acceptance of the grant after the State shall have been admitted, while, according to our practice heretofore, the acceptance is made at the time of the admission of the State. I very much prefer to adhere to this practice, under which the proposition is made and accepted at the time when the State is admitted, instead of our making this exceptional provision, entirely new to our legislation, pledging ourselves to all the Territories and giving them three years after their admission in which to accept the provisions of the grant. * * *

I took the position that it was unsafe to make pledges respecting the future disposition of the public lands and Territories changing their wants and conditions as rapidly as do the Territories of the United States.

It has been ably argued that the grant of lands to Oklahoma, by its enabling act of June 16, 1906 (34 Stat., 267), for the benefit of agricultural and mechanical colleges, was not in lieu of the benefits of the acts of 1862-66, but, in view of the Department's opinion that the measure of the grant is undetermined and undeterminable, it is unnecessary to pass upon this question. If this be true, it is a matter wholly within the discretion of Congress to say whether Oklahoma shall hereafter receive the benefits of said acts, and calls for no expression of opinion by this Department at the present time.

The decision of the Commissioner is affirmed.

JENSEN v. OSWALD.

Decided October 25, 1916.

CONTEST—RELINQUISHMENT—PREFERENCE RIGHT.

Where relinquishment of an entry is filed with full knowledge of the filing of a contest against the entry, such relinquishment will be presumed to have been induced by the contest, and the contestant will be recognized as entitled to a preference right to enter the land, notwithstanding notice of the contest may not have been served upon the entryman at the time of filing the relinquishment.

SWEENEY, *Assistant Secretary*:

Nels Jensen has appealed from the decision of the Commissioner of the General Land Office of January 20, 1915, rejecting his application to make homestead entry for section 4, T. 17 N., R. 31 W., North Platte, Nebraska, land district, and accepting the application of Joe C. Oswald therefor.

This land was formerly embraced in the homestead entry of James A. Wilkinson, made April 9, 1914, and on May 19, 1914, at 9 o'clock a. m., Oswald filed contest against the entry, charging among other things that the same was made for speculative purposes, and not for the purpose of establishing a home upon the land. On the same date,

at 9.07 o'clock, James A. Wilkinson filed a relinquishment of the entry, and Jensen filed application for the land. On May 21, 1914, Oswald filed his application therefor. The case should thereupon have proceeded in accordance with departmental regulations of April 1, 1913 (42 L. D., 71), and although this was not done, the regulations, nevertheless, apply in so far as the same are applicable to the present record.

Wilkinson was not formally served with notice of the contest prior to filing the relinquishment, but it is admitted that both he and Jensen were personally advised by the local officers that the contest had been instituted before the relinquishment and application were filed. The question presented is whether under the facts as established by the testimony and under the regulations prescribed by the Department, the relinquishment should be held to have been induced by the contest. If so, Oswald's application should be allowed.

The act of May 14, 1880 (21 Stat., 140), requires that a contestant must procure the cancellation of the entry to be entitled to a preference right; and while this provision of the statute can not be disregarded by the Department, it is competent for it to prescribe rules of evidence by which it will be governed in the administration of the act, and the same have from time to time been thus prescribed.

In the case of *Crook v. Carroll* (37 L. D., 513), the following rule was adopted:

Where it affirmatively appears of record that the contestee had actual notice of the contest before the filing of the relinquishment, or where notice was by publication and was posted and published in accordance with the rules of practice, or where, in the absence of record notice the contestant establishes actual knowledge of the filing of the affidavit of contest on the part of the contestee, or some one in privity with him, prior to the filing of the relinquishment, it will be presumed as a matter of law and fact that such relinquishment was induced by the contest.

It was there held that if the intervening entryman, or some person in privity with him in the purchase of the relinquishment of the former entryman, had actual knowledge of the filing of the contest in the local office prior to filing relinquishment, it would be conclusively presumed that the same was induced thereby.

Regulations under this and other cases were issued June 1, 1909 (38 L. D., 23), and September 15, 1910 (39 L. D., 217), and in the case of *Smith v. Woodford* (41 L. D., 606), the Department had occasion to consider the latter regulations, and held that the same could not be applied to the facts of that case, and suggested that the question of modification of the regulations would receive early consideration. Woodford filed application to enter certain lands in the exercise of a claimed preference right, as a successful contestant

against a prior homestead entry by one Bixler. The application was rejected by the Commissioner because it was conclusively shown that neither Bixler nor Smith, who filed application to enter the land at the time the relinquishment was filed, had notice of Woodford's contest, and the relinquishment was not, therefore, filed as a result of the contest. The Department concurred in this finding, but held that in view of the fact that Woodford had a good and sufficient affidavit of contest of record when Smith purchased the relinquishment, and filed the same without making inquiry as to the then condition of the record, although the relinquishment had been executed for a period of 16 months, Woodford was entitled to a preference right of entry, notwithstanding there was no proof of actual knowledge of the contest, since under the circumstances shown Smith was chargeable with constructive knowledge thereof. The statement in the syllabus that a contestant may be awarded a preference right of entry notwithstanding the relinquishment was in no wise the result of the contest is misleading, and does not express the real holding of the Department in the case.

The regulations of April 1, 1913, *supra*, which are the latest on the subject and modify the previous regulations of the Department, were adopted as a result of the decision in the Smith-Woodford case, and under the third subdivision of said regulations the presumption, where notice of contest has not issued, or, if issued, has not been served, is that the contest induced the relinquishment. This presumption is not conclusive, and may be overcome by showing that the entryman had no knowledge of the contest; but, if it appears that he did have knowledge thereof before filing the relinquishment, the case is practically the same as where it appears of record that the entryman had been served with notice of the contest, in which latter case the presumption is conclusive, and the contestant is awarded a preference right without the necessity of a hearing. In both cases notice is brought home to the entryman, and the distinction between the two is in form and not of substance. This being true, no reason is seen why the same rights should not be acquired by a contestant in one case as in the other. This rule works no hardship in this case, for Jensen and Wilkinson, with full knowledge of the contest, voluntarily elected to pursue the course they adopted rather than stand a trial on the contest.

Furthermore, the hearing should not have been ordered until Jensen had complied with the regulations above mentioned in attempting to avoid Oswald's presumptive preference right. The showing required thereby is in the nature of a petition or declaration filed in court upon the commencement of an action, and the purpose of the same is to advise the contestant of the issues he is required to meet.

It follows that Oswald's application should be accepted and that of Jensen rejected. The decision of the Commissioner is accordingly affirmed.

STATE OF UTAH.

Decided October 25, 1916.

SCHOOL INDEMNITY SELECTION—WATER RESERVE.

A tract of land embraced in a public water reserve under the act of June 25, 1910, is not subject to school indemnity selection by the State.

LANDS CHIEFLY VALUABLE FOR STOCK WATERING PURPOSES.

A tract of land situated in a large area of public grazing lands, and which is chiefly valuable as a watering place for stock, by reason of a spring located thereon, should be retained in public ownership, subject to the possible granting of a right of way for the construction of a reservoir for stock watering purposes under the act of January 13, 1897.

SWEENEY, Assistant Secretary:

In school indemnity list No. 04168, filed July 16, 1909, the State of Utah selected with other lands the SW. $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 8, T. 14 S., R. 15 E., which tract was embraced in a public water reserve by Executive order of March 29, 1912, under the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847).

March 5, 1914, the Commissioner of the General Land Office, considering the case upon the record, held the selection for cancellation as to the tract above described, and from this decision the State of Utah has appealed to the Department.

The adverse action of the Commissioner was because the Director of the Geological Survey, of date February 18, 1914, made report that the tract in question is a valuable watering place for stock, situated in a large area of public grazing lands, and should be retained in public ownership.

Pending this appeal the Department requested from the Geological Survey a report "upon all of the facts in your possession, showing the necessity for and propriety of continuing the reservation of the land." Such report has been received of date October 12, 1916, as follows:

Your letter requests report upon all facts "showing the necessity for and propriety of continuing the reservation of the land."

The physical facts concerning the land are as follows:

The tract is situated about 30 miles east of Price, Utah, and about 10 miles northeast of Sunnyside, near the crest of the West Tavaputs Plateau, on the Range Creek Mesa, as it is known locally. The elevation of the tract is from 9,000 to 9,500 feet. It lies near the head of Flat Canyon which drains eastward from the summit of the Mesa to Green River. The tract is reported by a mineral inspector of the General Land Office to contain no improvements and

to show no evidence of settlement at any time. It is nonmineral and the only timber is a few scattering bunches of aspens. The tract contains a small spring which constitutes its chief value. The district in which the spring is situated is an excellent stock range with numerous aspen groves and a heavy growth of grasses. This range is used for summer grazing and has a total area of about 150 square miles.

There is no question as to the purpose for which the selections were made. The special agent reports that this and other springs in the vicinity "as admitted by the original claimant, Mr. Nutter, are desired in order to secure this water and the consequent control of the range in this district." Neither in its original appeal nor in its supplemental brief does the State contend that the land is not chiefly valuable because of its control of the water thereon. On the contrary, the State argues that the control of such water is a matter exclusively within the control of the State, thus tacitly conceding the position of the Government in this regard. It may therefore be considered established that the tract involved is principally valuable because it controls a spring which affords a place where stock may water.

The second question raised is as to the necessity for the withdrawal. In an area of summer range such as that in which this tract is located, stock are entirely dependent for water on springs and streams. This range is as a whole public land and public grazing land has always been regarded as common. The Supreme Court in *Buford v. Houtz* (133 U. S., 326), says:

"We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them when they are left open and unenclosed, and no act of government forbids this use."

This citation indicates the public policy which has been followed in permitting the use of grazing lands. If, therefore, this policy is to remain in effect it is necessary that the stock using the land shall have access to water. If the lands controlling the springs and other bodies of water which are accessible to stock grazing on such an area of public range are permitted to pass into private ownership, the owner of such tracts can exclude the cattle of all others from the springs on the tracts and thus in effect make it impossible for other men's cattle to occupy and use the public range. This has actually happened in the present case for, by the judicious selection of springs in this vicinity, Mr. Preston Nutter is reported to have acquired for his stock practically exclusive possession of about 150 square miles of range in this vicinity. Certainly it behooves the Government to see to it that if the range is to be public in name it should be open to the public in fact. Withdrawal of the lands containing stock watering places is absolutely essential to this end.

The State urges that if these watering places are permitted to pass into private ownership they will be improved. The State in its argument says:

"The supply of water is limited and seldom, if ever, flows off the particular subdivision where it rises. This being true, in the very nature of things no great good can be gained from using them unless they are developed. . . . Who is going to do this if the public water reserve remains in force? . . . If the waters are left accessible to everybody, in a very short time the result will be, if such is not the condition already, that animals which go to these places to drink will so trample and destroy the efficiency of the springs or waterholes, or whatever they may be, as to make them comparatively useless for any practical purposes."

The best answer to this argument is perhaps to cite the facts in the present case. Although these lands were selected by the State in 1900 and have been controlled by Mr. Nutter since that date on the assumption that the selection would eventually be approved, no improvements have been erected on this tract and there is no evidence which indicates that the value of the tract for stock watering purposes has in any way been increased during the period the land has been controlled by Mr. Nutter.

It frequently happens that selections of this nature are made, not because the selector needs the water for his own stock, which have access to other springs in the vicinity, but because he thereby may prevent the cattle of others from using the surrounding range. Such a purpose is purely monopolistic and thoroughly adverse to present public policy.

The attention of the Department may in this connection be invited to the act of January 13, 1897 (29 Stat., 484), providing for the construction of reservoirs for stock-watering purposes. There would appear to be no objection to the granting of a right of way under this act to any person or live-stock company which desired to improve a spring and establish water troughs. It is true that under the statute "such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind," but the State seems to believe that this will be done in every event. If such a right of way were applied for, the withdrawals could be modified to permit its allowance, thus retaining title to the land in the United States while at the same time permitting its improvement under the act cited.

Many areas of public lands in Utah and other States which have heretofore been regarded as suitable only for range are being found to be adapted to dry farming. Settlement under the enlarged homestead act follows as rapidly as local conditions permit. Where, however, all local sources of water supply have previously passed into the hands of stockmen, who are naturally antagonistic to the breaking up of the range and its closer settlement, homesteaders frequently are placed under great disadvantages in endeavoring to secure domestic water. While it is doubtless true, as the State suggests, that casual travelers will not ordinarily be denied the use of water for temporary culinary purposes, permanent settlers will generally find themselves shut off from water by the fencing of springs and will be considered trespassers if they enter such lands to obtain water, even though it may not have been formally appropriated under the State law. Many cases of this nature have arisen in Utah and other States where conditions are similar. The withdrawals thus insure fair play now, and make possible future settlement where conditions warrant.

The third question raised in your letter is as to the "propriety" of creating reserves of this nature. It is presumed that this relates to the question raised by the State in its argument as to whether such withdrawals come within the purpose of and are authorized by the act of June 25, 1910 (36 Stat., 847).

It is unnecessary to enter into an extensive discussion of the temporary nature of such withdrawals. The withdrawal, in the language of the act "shall remain in force until revoked by him (the President) or by an act of Congress." The withdrawal may therefore continue so long as Congress or the President regards it as serving a useful public purpose.

The State contends that Congress "had no intention of conferring upon the President the right to make withdrawals whether they be classed temporary or permanent, for any such purposes as the one now under discussion." The only reason given for this belief is that:

"A withdrawal for public water reserves is nothing over which Congress has any dominion, and it would seem beyond question that no such withdrawal is

contemplated by the act. The power of Congress to legislate necessarily has reference only to the property of the United States, while this withdrawal has to do primarily with the property of the State."

We are thus solemnly assured that Congress did not intend to give the President authority to make such withdrawals because Congress knew it had no power in the matter since State property alone was concerned!

The order of withdrawal withholds from disposition a certain tract of the public land of the United States. Surely the State of Utah does not wish to question the right of Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The State's contention that the withdrawal deals primarily with the property of the State can only be understood when it is realized that the greater part of the State's argument is devoted to a discussion of the right of the State to control the appropriation and use of waters and of the interference of public water reserves therewith.

Much of this discussion is not germane to the present case. There is no evidence presented by the State that the water on this tract has ever been appropriated by any one under the laws of the State of Utah. The special agent who examined the land was unable to find any notice of water appropriation recorded. There is in the withdrawal of these lands nothing which prevents any person filing such an appropriation under the laws of Utah at any time. If, however, such an appropriator shall seek to fence the land, or to erect structures thereon which would prevent the public from continued free access to all parts of it, he would be exceeding the rights which could be granted him under State law and would become a trespasser on the public lands of the United States.

It is extremely doubtful if under the authority of the act of July 26, 1866 (14 Stat., 251), cited by the State, any one is authorized to enter on *withdrawn lands* of the United States for the purpose of constructing works for the diversion of water, without the consent and approval of the proper officers of the Government. This question is now before the Supreme Court in essentially this same form in the case *United States v. Utah Power and Light Company*, having been appealed by the company from the U. S. Circuit Court. Decision in this case will presumably dispose of the present contention of the State of Utah.

Having considered briefly these contentions of the State it remains to urge that a distinct "public purpose" is subserved by the withdrawal of these public lands. If, as the Supreme Court has said, the public lands are to be "free to the people," then an administrative action which tends to carry this public policy into effect and for which authority of law exists is justified. It has been shown that continued access to water is essential to the use of the public range in common. This can only be insured by the retention in public ownership of the lands on which the water is situated so that they may not be fenced and the public excluded therefrom. This, it is believed, constitutes a public purpose.

The argument of the State as to the power of the Department to reject its selection has been disposed of in other cases (See Administrative ruling of July 15, 1914 (43 L. D., 293). The request that the selection should be indefinitely suspended should also, in my judgment, be denied. So long as the selection is intact the claimant under the State will have a color of title through which he can deprive others of the use of this land and the water thereon. No legislation is proposed which would in any way alter the situation as regards these lands. It is my recommendation, therefore, that this selection be rejected.

In view of the above report the Department is clearly of the opinion that the tract described should be retained in public ownership and the reservation thereof continued.

The decision appealed from is accordingly affirmed.

PRICE ET AL. v. SHELDON.

Decided October 26, 1916.

ALASKA HOMESTEAD—ADVERSE CLAIM—PROTEST.

Protest against a homestead entry in Alaska, based on adverse occupancy, is barred by failure to assert the adverse claim within the period of 90 days provided by section 10 of the act of May 18, 1898.

ALASKA LANDS—POSSESSORY RIGHT—JUDGMENT IN ADVERSE PROCEEDINGS.

The judgment of a court of competent jurisdiction awarding the right of possession as between adverse claimants in a proceeding in accordance with the provisions of section 10 of the act of May 14, 1898, as carried into the act of March 3, 1903, is binding upon the land department in so far as the right of possession as between the parties is concerned.

SWEENEY, *Assistant Secretary*:

This is an appeal by John W. Price and John Johnson from a decision of the Commissioner of the General Land Office dated April 23, 1915, dismissing their protests, based upon adverse occupancy claims to the land, in the matter of homestead entry 06, Survey No. 375, made by Cyrus F. Sheldon under the act of May 14, 1898 (30 Stat., 409), as amended by the act of March 3, 1903 (32 Stat., 1028), Juneau land district, Alaska.

Sheldon's homestead application was filed May 8, 1908, alleging residence since June, 1895. Notice of application was given by publication from May 9, 1908, to July 9, 1908. Entry was allowed January 7, 1911, and final certificate issued January 11, 1911.

On June 10, 1908, John W. Price filed a protest and on July 8, 1908, during the period of publication, filed an adverse claim in the local office alleging occupancy of a portion of the land embraced in Sheldon's application. It appears that Price thereafter initiated proceedings in the District Court for Alaska, but that on the day set for trial the plaintiff by his counsel stated to the court that he did not further desire to prosecute his action and that the court on January 19, 1910, dismissed the complaint with prejudice and held Sheldon entitled to possession of the land in dispute against the plaintiff Price. The local officers, however, denied a motion to dismiss and on July 18, 1910, issued notice for a hearing between Price and Sheldon. The record discloses that notice of hearing was duly served upon the parties and that on the day set the protestee appeared by counsel but that protestant did not appear and that thereupon the protest was dismissed for want of prosecution.

On December 11, 1911, John Johnson filed protest and application to contest Sheldon's entry, alleging adverse possession to a portion of the land and a claim under purchase from one Livingston F. Jones, who claimed under a purchase from an Alaska Indian. The local officers denied this application on December 13, 1911, upon the ground substantially that John Johnson should have sought his remedy in the District Court.

On April 9, 1914, Jim Clark, an Indian, filed a protest against the issuance of patent to Sheldon, also based upon adverse occupancy of a portion of the land. This protest was transmitted to the Commissioner by the local officers without action.

Upon appeal, the Commissioner, in the decision complained of, held that Price had exhausted his remedy in the court and that Johnson's protest is barred by his failure to assert his claim within the period of 90 days provided by section 10 of the act of May 14, 1898, *supra*. As to the protest of Clark, the Commissioner held that he was under the disability of an Indian and that he was therefore not bound by the provisions of the act referred to. A hearing was therefore ordered to determine the respective rights of Clark and Sheldon. No appeal has been taken from this feature of the Commissioner's decision and Sheldon has elected to go to a hearing. Price and Johnson have appealed to the Department.

The act of March 3, 1903, *supra*, provides that the proceedings for obtaining title to homestead entries in Alaska shall be conducted under the procedure in obtaining patents to unsurveyed lands of the United States as provided by section 10 of the act of May 14, 1898, *supra*. Said latter act contains the following provision:

And thereafter such proof, together with a certified copy of the field notes and plat of the survey of the claim, shall be filed in the office of the surveyor-general of the District of Alaska, and if such survey and plat shall be approved by him, certified copies thereof, together with the claimant's application to purchase, shall be filed in the United States land office in the land district in which the claim is situated, whereupon, at the expense of the claimant, the register of such land office shall cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the District of Alaska, and the applicant shall at the time of filing such field notes, plat, and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days, and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and

thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

As to Price the record discloses that he has submitted his claim to the jurisdiction of the court under the act of May 14, 1898, *supra*, and that decision has been rendered against him. In the case of Crary *v.* Gavigan *et al.* (36 L. D., 225), it was held that the judgment of a court of competent jurisdiction awarding the right of possession as between adverse claimants in a proceeding in accordance with the provisions of section 10 of the act of May 14, 1898, as carried into the act of March 3, 1903, is binding upon the land department in so far as the right of possession as between the parties is concerned. It therefore appears that Price has no standing before the Department and that his protest should be dismissed.

Johnson's appeal is directed mainly to the contention that an Indian in Alaska can convey his possessory rights and that a claimant under such conveyance is entitled to assert ownership to the land. The Department finds it unnecessary to discuss this feature of the case. The Indian at least could convey no more than a possessory right which must be asserted under the law at the proper time in the face of proceedings by a homesteader. Notice of publication was given from May 9, 1908, to July 9, 1908, and Johnson's protest and application to contest was not filed until December 11, 1911. The act of May 14, 1898, *supra*, provides for the assertion of adverse claims within the 60-day period of publication or within 30 days thereafter. Johnson failed to avail himself of the privilege of filing such claim within the time allowed and submitting his case thereafter to a court of competent jurisdiction. His protest therefore came too late and he has no standing as an adverse claimant to the lands involved.

The decision appealed from is accordingly affirmed.

PRICE *v.* SHELTON.

Motion for rehearing of departmental decision of October 26, 1916 (45 L. D., 555), denied by First Assistant Secretary Vogelsang, January 12, 1917.

OHMER *V.* HENSEL.

Decided October 27, 1916.

ENLARGED HOMESTEAD—PETITION FOR DESIGNATION—CONFLICTING APPLICATION.

Upon allowance of an application to enter accompanied by a petition for designation under the enlarged homestead act, the rights of the applicant attach as of the date of the filing of the application and petition, and all rights under a conflicting intermediate application are thereupon *eo instanti* terminated as to the land in conflict.

SWEENEY, *Assistant Secretary*:

Ohmer V. Hensel has appealed from decision of the Commissioner of the General Land Office rendered May 15, 1916, in the above-entitled case, rejecting his homestead application 012879, filed April 13, 1915, under the act of February 19, 1909 (35 Stat., 639), as amended by the act of March 4, 1915 (38 Stat., 1162), for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10, T. 4 S., R. 20 E., B. H. M., Pierre, South Dakota, land district, on the ground of conflict as to the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, with the prior right of Harold P. Gilchrist under homestead application (Pierre 012859) filed April 9, 1915, for the entire E. $\frac{1}{2}$, said Sec. 10, which latter application was allowed January 10, 1916.

The E. $\frac{1}{2}$, said Sec. 10, was designated November 16, 1915, upon Gilchrist's petition accompanying his homestead application, which designation was to become effective January 10, 1916.

The record discloses that Gilchrist on July 28, 1916, filed in the local land office a formal relinquishment of his conflicting entry and on the same day one Willard M. Gilchrist filed homestead application 014261 for the same land, which latter application is held suspended in the local land office awaiting final action by the Department upon Hensel's present appeal.

Hensel now asserts that in view of Harold P. Gilchrist's relinquishment his additional homestead application 012879 is a proper one for allowance as originally filed, the primary objection raised as against the allowance thereof having been removed. The Department can not concur in this contention.

When Harold P. Gilchrist's homestead application 012859, accompanied by his petition for designation, was filed (*April 9, 1915*), Gilchrist's rights thereunder were merely held in abeyance until such time as it was definitely determined, upon his petition for designation, whether or not the lands sought to be entered by him were of the character contemplated by the enlarged homestead law. When favorable action was taken upon his petition, and the lands so designated, his rights in the premises attached as of the date of his original filing and any rights that Hensel may have had under his subsequent homestead application, now under consideration, in so far as the tracts conflicting with that embraced in Gilchrist's entry are concerned, were *eo instanti* terminated.

While strictly speaking the register and receiver should have suspended Hensel's subsequent homestead application and petition for designation filed April 13, 1915, until after final action was taken upon the former application and petition of Gilchrist, nevertheless no grievous error was committed by the rejection of the former by the local officers in view of the fact that the subsequent proper allowance of Gilchrist's entry, 012859, would have later

necessitated such rejection. (See paragraph 5, circular of April 17, 1915, 44 L. D., 68-70.)

The Department therefore finds that Harold P. Gilchrist's entry was properly allowed and the action taken by the Commissioner rejecting Hensel's application for conflict in part therewith was correct.

The decision appealed from, in so far as it rejects Hensel's application as to the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, said Sec. 10, is affirmed and the case remanded with the view, if Hensel so elects, of taking appropriate action upon his petition for designation and allowing his additional homestead application, under the act of July 3, 1916, as to the remaining noncontiguous tract, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 10, provided, of course, all the land originally entered by him shall have been designated.

STONE v. HOWARD.

Decided November 6, 1916.

CONTEST—ABANDONMENT—JUDICIAL RESTRAINT.

A contest on the ground of noncompliance with law will lie against a homestead entry under the act of June 6, 1912, after the expiration of six months from the date of entry, notwithstanding the entryman may have been placed under judicial restraint before the expiration of the six-month period, where he had not established residence and otherwise complied with the law prior to the time he was placed under such restraint.

SWEENEY, Assistant Secretary:

June 30, 1914, Frank Howard made homestead entry 018032, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, T. 19 S., R. 63 W., 6th P. M., Pueblo, Colorado, land district.

October 18, 1915, Emory V. Stone filed contest affidavit against said entry, charging:

That said Frank Howard, from best information available, has never seen nor been on said claim, has made no improvements whatever, and has not been in the State for one year, and has not fulfilled any requirements whatsoever to entitle him to hold said claim.

November 10, 1915, contestee made answer as follows:

Denies each and every allegation contained in the affidavit of contest, and alleges that the said township was not subject to entry at the time the said application was filed in the United States land office at Pueblo, Colorado, and did not become subject until on or about the 11th day of December, 1914. That by decision of the Commissioner of the General Land Office, dated May 17, 1915, in the matter of homestead entry of this claimant and others it was held that the entryman could not be required to establish residence on or improve or cultivate the land until the statutory period after the said land was subject to entry, to wit, six months from the said 11th day of December, 1914.

That within six months of the time when said land was subject to entry, this claimant was placed under judicial restraint, and that by reason thereof this claimant was compelled to be absent from the said claim and is still absent therefrom by reason of said judicial restraint.

The hearing took place before the local officers in January, 1916, and February 11, 1916, the local officers joined in decision as follows:

This case was heard at this office on January 21, 1916. The evidence shows that contestee admits that he never had established residence upon the land in controversy up to the date of the filing of the application to contest, and the evidence introduced shows that he was convicted of a crime against the United States laws, plead guilty and was sentenced and committed to the penitentiary at Leavenworth, Kansas, for a period of one year, and is now confined in said penitentiary.

Under the evidence and admission, and in accordance with the rulings of the Department heretofore made, we are compelled to find in favor of the contestant, and we therefore recommend that the contest be sustained and the entry canceled.

June 24, 1916, the Commissioner of the General Land Office, considering the case upon the record, disposed of it as follows:

If the legality of the entry under consideration was not established until December 14, 1914, the date the land was made subject to entry, defendant would be required to establish his residence on his claim by June 14, 1915, which he admits he never did.

A failure of a homestead claimant to establish his residence on the land covered by his entry can not be excused on the ground that it was due to his arrest under a criminal charge and subsequent sentence thereunder. *Gore v. Brew* (12 L. D., 239) ; *Williams v. Block* (26 L. D., 416).

The entryman's defense in this case is, first, his entry should not have been allowed on June 30, 1914, and second, judicial restraint prevented him from establishing residence on the claim.

From this decision claimant has appealed to the Department. There is no conflict of testimony. It appears that contestee was allowed to consider and treat his entry as made December 14, 1914; that within six months from that date, to wit, from about March 24, 1915, until one year from May 18, 1915, he was under judicial restraint, having been arrested upon an indictment of infringement of the criminal law, pleaded guilty, and was sentenced to confinement in the penitentiary at Leavenworth, Kansas, for one year and one day from May 18, 1915. Contestee claims that as he was under judicial restraint from a date within six months from December 14, 1914, and such fact being shown at the trial, he was entitled to one year from the date of his entry, December 14, 1914, in which to make residence thereon.

The only question raised is whether or not the contest was premature because brought within one year from date of his homestead entry. In the last analysis the sole question presented is whether or not under the act of June 6, 1912 (37 Stat., 123-124), and section

35, paragraph (a) of the circular No. 414 of the General Land Office, approved June 1, 1915 (44 L. D., 91, 103), contestee can be allowed six months' extension of time in which to establish residence upon the land embraced in his entry. The contest was brought more than six months after date of entry, and claimant had made no residence whatever upon the land. He claims, however, that the cause of his failure to establish residence was on account of the judicial restraint, as hereinbefore stated, and that contest could not be brought against his entry until one year from date thereof.

This contention can not be sustained, as the Department is of the opinion that no new question is presented because of said act of June 6, 1912, *supra*, and regulations thereunder. See case of *Williams v. Block* (26 L. D., 416), in which it is decided that:

A plea of "judicial restraint" will not be accepted as a sufficient defense to a charge of noncompliance with the law in the matter of residence and cultivation, if the homesteader had not established residence and otherwise complied with the law prior to the time when he was placed under such restraint.

The decision appealed from is affirmed.

KUBENA v. CARSON.

Decided November 20, 1916.

SETTLEMENT ON UNSURVEYED LAND—JURISDICTION OF LAND DEPARTMENT.

The land department will not undertake to determine the rights acquired by settlement upon unsurveyed lands until such lands become subject to disposition and application is filed to make entry thereof.

SWEENEY, Assistant Secretary:

July 7, 1915, Agnes R. Kubena filed protest and application for hearing to determine the question of settlement right between herself and Mrs. Della Meyer Carson on unsurveyed lands supposed to be when surveyed the SE. ¼, Sec. 8, and SW. ¼, Sec. 9, T. 3 N., R. 7 E., N. M. P. M., Santa Fe, New Mexico, land district.

The local officers issued notices for hearing and said hearing took place with both parties present with counsel and submitting testimony.

October 19, 1915, the local officers, upon consideration of the testimony adduced, joined in decision finding the superior right in Kubena, from which decision Carson appealed to the Department.

March 27, 1916, the Commissioner of the General Land Office, considering the case upon the record, disposed of it as follows:

It appears from the records of this office that, by letter "E" of July 26, 1912, the above described township was suspended from entry and all forms of disposal, pending a resurvey thereof. Said suspension was afterwards removed,

as to certain sections in said township, but, as to said Secs. 8 and 9, said suspension remains in full force and effect.

Your action in entertaining the protest and ordering a hearing thereon was erroneous, for the reason that there is no authority to determine the rights of settlers until the lands settled upon become subject to entry and an application is thereafter filed to make entry.

When the approved plat of survey is filed in your office and for three months thereafter, parties who claim to have settled upon the land may file their applications in your office to make entry, alleging settlement since a certain date, and if the applications conflict, you are required to order a hearing to determine the rights of the respective parties. Until the plat is filed, however, you have no authority to entertain contests, protests or applications for lands having the status of unsurveyed lands.

From this decision Kubena has appealed to the Department. The only question presented from the appeal is as to authority to order hearing and determine the rights of settlers upon unsurveyed lands before they become subject to entry and application is filed to make entry thereof.

Section 3 of the act of May 14, 1880 (21 Stat., 140), provides as follows:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the preemption laws.

Upon this appeal it is contended that authority to order hearing and decide the rights of parties to this controversy is found in instructions of May 15, 1907 (35 L. D., 565), and in the case of Susan A. Leonard (40 L. D., 429). Such instructions and decision have been carefully examined and nothing is found in either thereof to sustain this contention.

On the other hand, it is found that the settled practice of the land department has long been to decide claims of settlers' rights only when some application is made looking to obtaining title to the land in question.

Settlement upon unsurveyed land not subject to entry does not segregate it from the public domain, and two different persons may establish and maintain settlement right until one of them attempts to obtain title to the tract, and their preference right to do so because of settlement claim will be decided only when attempt is made to make such claims of record under section 3 of the act of May 14, 1880, *supra*.

The decision appealed from is affirmed.

WEST OKANOGAN VALLEY IRRIGATION DISTRICT.

Decided November 24, 1916.

RIGHT OF WAY—IRRIGATION CANAL—COLVILLE INDIAN ALLOTMENTS.

Lands in the north half of the Colville Indian reservation, allotted in severalty and held under trust patents, constitute a reservation of the United States within the meaning of section 18 of the act of March 3, 1891, and the Department has jurisdiction, with consent of the allottee or after condemnation proceedings, to approve, under that act, rights of way across the same for an irrigation canal.

DEPARTMENTAL DECISION DISTINGUISHED.

Departmental decision in Icicle Canal Co., 44 L. D., 511, distinguished.

SWEENEY, *Assistant Secretary*:

This is an appeal by the West Okanogan Valley Irrigation District from the decision of the Commissioner of the General Land Office, dated March 21, 1916, rejecting the application filed by it at Waterville, Washington, for a right of way for a portion of its irrigation canal, flume and pipeline across certain Colville Indian allotments, in townships 37, 38, 39 and 40 N., R. 27 E., W. M., under the act of March 3, 1891 (26 Stat., 1095).

From the Commissioner's decision it appears that the Indian allotments in question were made under the acts of July 1, 1892 (27 Stat., 62), and July 1, 1898 (30 Stat., 593), trust patent under section 5 of the act of February 8, 1887 (24 Stat., 388), having been issued July 31, 1900. The Commissioner, after referring to the case of the Fresno Water-Right Canal (35 L. D., 550), held that approval of the application could not be made under the Department's decision in the case of the Icicle Canal Company (44 L. D., 511).

The Department, upon September 7, 1916, referred the matter to the Commissioner of Indian Affairs for a report, and from the Commissioner's report of October 31, 1916, it appears that the right of way applied for will cross the following allotments:

Robert Evans	C-129
Ella Evans	C-180
Madeline Nicholson	C-145
Narcisse Brooks	C-153
Essie Cover	C-172
Ida Cover Francois	C-173
Lee Kover (Mason)	C-174
Mackey (Edwards) Derickson	C-171
Jennie Cosmoshas Joseph	C- 94
Chief Antoine	C-242

All of the Indians involved, except two, have given their consent without asking damages, due to the fact that the benefit they will receive from the construction of a ditch will amply compensate them;

the heirs of Chief Antoine also being satisfied in the award for damages occasioned by the pipeline. One Lee Kover (Mason) has given his consent upon the condition that he be permitted to use water from the proposed system for stock-watering purposes. Robert Evans has not consented, but the Commissioner of Indian Affairs recommends that the application as to his allotment be nevertheless approved, upon the ground that the benefits are sufficient to compensate Evans, and that Evans's demands are unreasonable.

The act of March 3, 1891, *supra*, in section 18, grants the right of way for irrigation ditches—

through the public lands and reservations of the United States * * * provided that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation.

The Colville Indian Reservation was created by Executive order dated July 2, 1872. The lands here involved lie within the north half of the reservation, originally opened to settlement and entry by the act of July 1, 1892 (27 Stat., 62.) This act provided in part, in Sec. 1, that—

subject to the reservation and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation in the State of Washington herein provided for; all the following described tract or portion of said Colville Reservation, viz, * * * be, and is hereby, *vacated and restored to the public domain*, notwithstanding any Executive order or other proceeding whereby the same was set apart as a reservation for any Indian or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.

Section 4 of the act authorizes an Indian then residing upon the portion of the Colville Indian Reservation "hereby vacated and restored to the public domain" to select from "said vacated portion" 80 acres of land to be allotted to him in severalty. Section 8 provided:

That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of the said Colville Reservation, *whether that hereby restored to the public domain or that still reserved by the Government for their use and occupancy.*

The act of July 1, 1898 (30 Stat., 593), provided that the allotments in severalty—

shall be selected and completed at the earliest practicable time and not later than six months after the proclamation of the President opening the vacated portion of said reservation to settlement and entry * * * at the expiration of six months from the date of the proclamation by the President, and not before the nonmineral lands within the vacated portion of said reservation which shall not have been allotted to Indians, as aforesaid, shall be subject to settlement, entry and disposition.

The President's proclamation opening the north half of the Colville Reservation was issued April 10, 1900 (31 Stat., 1963). The proclamation opened the lands to settlement and entry, "saving and excepting such tracts as have been or may be allotted to, or reserved or selected for, the Indians, or other purposes."

From the above resume of the laws and proclamation of the President concerning the north half of the Colville Reservation, it would appear that the reservation was originally created by an Executive order. The act of July 1, 1892, *supra*, in restoring certain parts of the original Executive reservation to the public domain, distinctly provided that the action was subject to the allotment of lands in severalty to the individual members of the tribe. The United States still exercises its guardianship over these individual Indians, who are subject to the control of the Indian agent, and for whose benefit various appropriations have been made by Congress. The question first presented, therefore, is as to whether such allotments do not constitute a reservation, as provided in the act of March 3, 1891, *supra*.

In the case of the Fresno Water-Right Canal, *supra*, the right of way desired under the act of March 3, 1891, was through the Papago Indian Reservation, across lands which had been allotted in severalty. The Department there held that such approval might be given, stating at page 551:

The land affected by the present application is within a technical reservation of the United States and the fact that the lands sought to be traversed have been actually allotted does not, in my opinion, take them out of the scope of the act.

In that case, however, there does not appear to have been any act opening any portion of the Indian reservation to settlement and entry as part of the public domain.

In the case of the *United States v. Celestine* (215 U. S. 278), the Supreme Court had under consideration the status of the Tulalip Indian Reservation, which likewise had been partly allotted in severalty, but none of which had been restored to the public domain. The court there held that a criminal offense committed within the limits of the reservation, but upon the individual allotment of one of the Indians, was within the exclusive jurisdiction of the United States. In defining the word "reservation," the court stated, at page 285:

The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.

The status of the lands in the Colville Reservation affected by the acts of July 1, 1892, and July 1, 1898, was considered by the Supreme Court in the case of *United States v. Pelican* (232 U. S., 442), which likewise involved the criminal jurisdiction of the United States. The court, after referring to the provisions of the above two acts, used the following language, at page 446:

The evident purpose of Congress was to carve out of the portion of the reservation restored to the public domain the lands to be allotted and reserved, as stated, *and to make the restoration effective only as to the residue.* The vacation and restoration, which the statute accomplished (Sec. 1) was thus expressly made "subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation" for which the act provided. In 1898 in furtherance of the same object, Congress required the completion of the allotments as soon as practicable and not later than six months after the President's proclamation (act of July 1, 1898, c. 545, 30 Stat., 571, 593). Accordingly, the President issued his proclamation on April 10, 1900, declaring that the restored portion of the reservation would be open to settlement and entry on October 10, 1900, and an appropriate clause was inserted which saved and excepted such tracts as had been or might be "allotted to or reserved or selected for the Indians, or other purposes," under the governing statutes.

Under the provisions of the Colville acts, therefore, and the construction placed thereon by the Supreme Court, I am of the opinion that lands allotted in severalty to the Indians upon the north half of the Colville Reservation, and held under trust patent, still constitute, for many purposes, a reservation of the United States, and that the Department has jurisdiction to approve the present right of way, unless such action is inconsistent with its duty under the provisions of the trust patent. As to the last-mentioned suggestion, it is necessary to consider the case of the Icicle Canal Company, *supra*, which formed the basis of the Commissioner's decision here under review.

The Icicle Canal Company case involved an application for right of way over an allotment made upon the public domain, under section 4 of the act of February 8, 1887 (24 Stat., 388), still held under trust patent. The Department there said, at page 513:

In the present case, the act of March 3, 1891, grants a perpetual easement over either public lands or reservations of the United States. It is extremely doubtful that an allotment under section 4 of the act of February 8, 1887, upon the public domain, can be regarded as a reservation. By the approval of allotment and issuance of trust patent the Indian was given a written promise that the particular tract would be held in trust for him and that ultimately he should have a fee simple patent, and it is, therefore, very doubtful, to say the least, if land in such status can be considered to be public land of the United States, within the meaning of the act of March 3, 1891. The grant of a perpetual easement, under the act of March 3, 1891, conflicts with the Government's obligations to the Indian, as set forth in section 5 of the act of February 8, 1887, since it prevents the issuance of the fee patent "free of all charge or encumbrance whatsoever."

At the outset, it must be kept in mind that in the present case the allotments were made while the lands were still part of an Indian reservation, and that they still, for many purposes, constitute an Indian reservation, while in the Icicle Canal Company case, the Indian had severed his tribal relations, and had settled upon the public domain. Further, section 4 of the act of July 1, 1892, provided that the allotted lands upon the Colville Reservation "shall be subject to the laws of eminent domain of the State of Washington." The act of March 3, 1901 (31 Stat., 1084), provides:

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located, in the same manner as lands owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Section 6358, Remington and Ballinger Annotated Codes and Statutes of Washington, authorizes the condemnation of lands for a right of way for irrigation ditches.

Congress, therefore, as to allotments upon the Colville Indian Reservation, has distinctly provided that such lands may be condemned for public purposes. Condemnation is merely one method of obtaining a right of way which may, by implication, be likewise obtained by agreement. In other words, as to the Colville allotments, Congress has indicated its assent that the restriction of the trust patent shall not prohibit the acquisition of rights of way for irrigation ditches. The reasoning contained in the Icicle Canal Company case, therefore, concerning the Government's obligation under trust patents, does not apply to allotments upon the Colville Indian Reservation made under the acts above cited.

As to all of the allotments, therefore, save those of Lee Kover (Mason), and Robert Evans, the Commissioner's decision is reversed and the application for right of way will be approved, in the absence of other objection. The Department is unable to concur in the suggestion of the Commissioner of Indian Affairs that the application for right of way as to the remaining two allotments be approved without the consent of the Indian. By the selection of the allotment, and the issuance of trust patent, the Indian secured such a vested equitable title that the Department should not approve an application for right of way across his land without his consent. Should the West Okanogan Valley Irrigation District secure the consent of these two Indians, either by agreement or condemnation proceedings, the application for right of way as to them will likewise be approved, in the absence of other objection.

The decision of the Commissioner is modified, as above stated, and the matter remanded for further proceedings in harmony herewith.

A copy of this decision has been furnished the Commissioner of Indian Affairs for his information.

EDNA GRACE SMITH.

Decided November 27, 1916.

SIoux INDIAN ALLOTMENT—RIGHTS OF HEIRS.

The acts of Congress authorizing allotment of Sioux Indian lands contemplate allotments only to living persons; and where one entitled to allotment dies without allotment having been made or selection filed by him or in his behalf, the right perishes with him and his heirs are not entitled to allotment based upon his right.

ALLOTMENT RIGHT DETERMINED AS OF WHAT DATE.

Executive order of August 24, 1889, annulled the prior order of May 17, 1887, and directed allotment work anew on the Yankton reservation. *Held*, the right to allotment must be determined in accordance with conditions existing August 24, 1889, the date of the President's later order.

SWEENEY, Assistant Secretary:

Alfred C. Smith appealed from decision of the Commissioner of Indian Affairs denying his application for allotment to his deceased minor child, Edna Grace Smith, as a Yankton Sioux Indian, on the Yankton reservation, South Dakota.

The President, on May 17, 1887, issued an order for making allotments in severalty to the Indians of the Yankton reservation under the act of February 8, 1887 (24 Stat., 388), section 1 of which provides, among other things:

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation.

Instructions were issued August 8, 1887, under the President's order, to Special Agent West, who proceeded to make allotments. The child, Edna Grace Smith, was born in January, 1888, and died May 21, 1889, and not having been born prior to the President's order of May 17, 1887, she was not entitled to an allotment thereunder. The work of Special Agent West proved unsatisfactory, and the allotments made by him were never approved. The President, August 24, 1889, canceled his previous order of May 17, 1887, and directed allotment work anew on the Yankton reservation. Thereupon instructions were issued August 31, 1889, to Special Agent Hatchitt as follows:

You will, therefore take the ages of the allottees as of the date of August 24, 1889, and their age and status at that time will control the quantity of land to which allottees are entitled. Children born before that date are entitled to allotments.

The allotments heretofore made by you and those made by late Special Agent West should be revised upon this basis.

Referring to your letter of July 10, 1889, you are also instructed, by direction of the Acting Secretary of date August 21, 1889, not to allot to members of any class not in being at the time the allotments are actually made.

The directions of the Department referred to in the above instructions were addressed to the Commissioner of Indian Affairs, and are as follows:

I am in receipt of your communication of the 20th inst., inclosing letter of Special Agent Hatchitt, now engaged in allotting lands to Yankton Indians, in which he states that he is allotting to all who were living at the date of the allotment act, February 8, 1887, or who were born before the date of the order of the President, whether they have since died or not, and asks if this is correct.

You express the opinion that it was not the intention of the act to authorize allotments to members of any class not in being at the time allotments are actually made.

Your opinion is concurred in, and you will so instruct the special agent.

The Solicitor for this Department, on November 4, 1914, rendered opinion in the case of Joseph F. Estes, applicant for allotment to his deceased minor child, Malcolm Du Pont Estes, on the Yankton reservation, in which opinion it was held, among other things:

It seems clear from all the facts that it was intended by the Executive order of August 24, 1889, to annul the prior one of May 17, 1887, and to fix the status of all persons as of the date of the new authority. The effect of this was to advance the date on which the status of all persons, for the purpose of making allotments, was to be determined. After the order of August 24, 1889, the status of all allottees was to be determined as of that date which included persons to whom allotments had been made under the old order as well as new allottees; therefore, in the event of the death of an allottee under the old order the Agent was not authorized to make an allotment in the deceased allottee's name because of his instructions "not to allot to members of any class not in being at the time allotments are actually made."

The child in that case was born June 27, 1886, and died February 1, 1888. The name of this child was on a schedule of allotments made by Special Agent West under the President's order of May 17, 1887, but it was nevertheless held that he was not entitled to an allotment on the Yankton reservation; he not being alive at the time of the President's order of August 24, 1889. Although the child, Edna Grace Smith, was born prior to the President's order of August 24, 1889, she was not alive on that date or at the time allotments were made thereunder. The Department has uniformly construed the general allotment act of February 8, 1887, and similar allotment acts, to mean that the allottee must be in being at the time the allotments are made. Willie Dole (30 L. D., 532); Dallas Shaw (40 L. D., 9); Instructions (42 L. D., 446); John Gassman (42 L. D., 582). This construction was sustained by the Supreme Court in the case of *La Roque v. United States* (239 U. S., 62, 66), wherein it was held:

We think the terms of the general act contemplated only selections on the part of living Indians acting for themselves or through designated representatives. The express provision for selections in behalf of children and of Indians

failing to select for themselves and the absence of any provision in respect of Indians dying without selections are persuasive that no selections in the right of the latter were to be made. In other words, as to them there was no displacement of the usual rule that the incidents of tribal membership, like the membership itself, are terminated by death. See *Gritts v. Fisher*, 224 U. S., 640, 642; *Oakes v. United States*, 172 Fed. Rep., 305, 307. It is upon this view that the execution of the general act and other similar acts has proceeded. 30 Land Dec. 532; 40 Id. 9; 42 Id. 446, 582; *Woodbury v. United States*, 170 Fed. Rep. 302.

It is alleged by Alfred C. Smith, father of the child in question, that an allotment selection was actually made for her during her lifetime while Special Agent West was at work making allotments on the reservation, and that he called the attention of Special Allotting Agent Hatchitt to the matter, when that officer began work, but that the latter refused to allot his child, who was then dead. The records of the Indian Office fail to show that such a selection was made. The act of 1887 provides that allotments shall be made by special agents appointed by the President for that purpose. From the decisions and instructions of the Department under said act and other similar acts, it appears that, in order to initiate a valid right of allotment, the selection must be filed with some officer of the Indian Service authorized or directed to make allotments. This is clearly indicated by such expressions as "there had been no selections made, and no applications filed in the local office as required by law"; "where selections of land have been received in the local land office"; "application for an allotment is made by him or in his behalf to a special allotting agent or some other officer of the Indian Service, directed by the Secretary of the Interior to make allotments, or selection is made for him by such officer"; "only those children by or for whom selections have been made during their lifetime and properly filed with the officer in charge of the reservation, or the allotting agent." See case of *Dallas Shaw*, 40 L. D., 9. It was held in the case of *John Gassman* (42 L. D., 582), that "in order to initiate such right to allotment as can be confirmed to the heirs after death, applications must have been made or selection filed with some officer of the Indian Service authorized or directed to make allotments." On the other hand, it has been held that if selection has thus regularly been made by or for a person in being, so that nothing remains but the scheduling and approval of the described selection, then a right is initiated and secured which can be confirmed for the benefit of the heirs. *Charles Tackett* (40 L. D., 4) and cases cited therein.

The father, Alfred C. Smith, states that prior to the death of his child, Edna Grace Smith, he not only made a selection for her, but also made selections for other members of his family—his children, brothers, and father. The records of the Superintendent at Yankton show that Alfred C. Smith, on June 29, 1889, made selections for his three brothers, William, John, and Charles. This is

the date indorsed on the certificates of allotment issued to Alfred C. Smith as being the date on which these selections were made in behalf of his three brothers. The Superintendent's allotment tract book shows that certificates of allotment were issued to Alfred C. Smith and his son, Leonard C. Smith, on the same date, June 29, 1889. This was more than a month after the death of Edna Grace Smith.

However, if a selection was in fact made for Edna Grace Smith, it must have been done prior to the President's second order of August 24, 1889, and, therefore, under the President's original order of May 17, 1887. Even if this were shown, under the opinion in the case of Malcolm Du Pont Estes, which held that the situation was as if the original order for all allotment had never been issued by the President, and that right to allotment must be adjudicated in accordance with the conditions existing August 24, 1889, the date of the President's second order for allotment, Alfred C. Smith was not entitled to an allotment selection on behalf of his minor child, Edna Grace Smith. At that time said child was dead, and, under the construction of the law and the specific instructions issued to the allotting agent under the President's order of 1889, there was no authority to allot an Indian not in being at the time.

Moreover, it is reasonably deduced from the evidence that while Alfred C. Smith may have viewed a certain tract of land and concluded he would have the same allotted to his child, Edna Grace Smith, no further action was taken looking to the consummation of the selection prior to her death. It was held in the case of John Gassman (42 L. D., 582), that "No such right is acquired by the mere inspection of a tract of land and decision to take it as an allotment, without application therefor or selection thereof during the lifetime of the proposed allottee, as will entitle his heirs, after his death, to an allotment of the land."

The action taken by the Commissioner of Indian Affairs in this case was proper, and is hereby affirmed.

CRAIG v. ATTEBURY.

Decided December 5, 1916.

THREE-YEAR HOMESTEAD LAW—ABANDONMENT.

A charge of abandonment of a homestead made under the provisions of the act of June 6, 1912 (37 Stat., 123), is not sustained where the evidence produced shows that the contested entryman has not been absent from the land covered by his entry for as long a period as six months.

DEPARTMENTAL DECISION DISTINGUISHED.

Departmental decision in *Stout v. Low* (41 L. D., 629), distinguished.

VOGELSANG, First Assistant Secretary.

This is an appeal by Benjamin I. Craig from a decision of the Commissioner of the General Land Office dated May 2, 1916, dismiss-

ing his contest against homestead entry 019510, made by Arthur Attebury, for the S. $\frac{1}{4}$ Sec. 13, T. 19 S., R. 61 W., 6th P. M., Pueblo land district, Colorado.

The entry was made on January 8, 1915, under the act of June 6, 1912 (37 Stat., 123), and on August 7, 1915, Craig filed affidavit of contest against the same, alleging that—

Arthur Attebury has wholly abandoned said homestead entry; that he sold and disposed of all his improvements on said land, which consisted of a house, barns and fencing, and the same were removed from said land; that he abandoned said entry in April, 1915, and declared his intention of never returning to said land; that there are no improvements of any kind on said land, and so far as I am able to ascertain, he will never return to said land.

Defendant was served with notice of contest, in the State of Kansas, on August 29, 1915, and on September 27, 1915, filed the following answer:

Denied that he has ever abandoned the said homestead entry since the making thereof, or has ever declared any intention of abandoning the said land or of not returning thereto; alleges that, as shown upon the face of the contest affidavit, he has not absented himself from said land for a period of six months; admits that certain of the improvements on said claim were removed therefrom subsequent to the first of April, 1915, but alleges that affiant is rebuilding thereon, and that at no time since the making of said entry has affiant any intention of abandoning the said land, but that he intends to continue to reside thereon and to further improve the same.

Hearing was had before the local officers on October 26, 1915, both parties appearing in person and by counsel, and upon the testimony adduced the local officers found that the charge of abandonment had been sustained and recommended that the entry be canceled. Upon appeal, this action was reversed by the Commissioner, who found that the contest was premature, and therefore dismissed the same. Further appeal brings the matter before the Department for consideration.

The testimony shows that a few days after the entry was made the defendant established his residence on the land. He erected a house, barns, fenced some land and dug a well about 70 feet deep. He remained on the land until April 2, 1915, at which time he started to his former home in the State of Kansas. It appears that he took with him his horses and wagon, and first went to Pueblo, Colorado, where he sold his team and then continued his journey to Kansas. He afterwards sold all of the improvements upon the land for \$100, and the same were removed, and when the contest was filed there were no improvements of any character upon the land except a well.

After being served with notice of contest, the defendant returned to the land September 23, 1915, erected a small house, and was living there on October 26, 1915, when hearing was had.

The defendant testified that he left the land and went to Kansas to engage in harvesting, as the wages were exceptionally good. He said he sold his improvements because he feared the same might be destroyed, during his absence, by prairie fires, and that he had no intention of abandoning the claim.

Section 2297, amended by the three-year homestead act of June 6, 1912 (37 Stat., 123), under which the entry here involved was made, provides as follows:

If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government.

Under the terms of this act the Commissioner held that, since the time between the date the defendant left the land and the date the contest was filed was less than six months, the same was premature.

However, attention is directed in the appeal to the case of *Stout v. Low* (41 L. D., 629), wherein it is held that in a contest charging abandonment, proof, after due notice, that the entryman has changed his residence from the homestead to another place, warrants cancellation of the entry, without reference to the duration of his residence elsewhere, and it is urged that under the doctrine announced in that decision it should be held, under the facts presented, that there had been an abandonment in fact and that the contest should be sustained.

As to this contention it may be said that the decision in the case of *Stout v. Low*, *supra*, involved a homestead entry made April 4, 1908, under the five-year homestead act, which provided for the forfeiture of a homestead entry upon proof that the entryman "had actually changed his residence, or abandoned the land for more than six months," whereas the entry here involved was made under the act of June 6, 1912, *supra*, which very materially amends section 2297, Rev. Stat., by providing for the forfeiture "of a homestead entry upon proof that the entryman has abandoned the land for more than six months at any time." In other words, it was held in that case that proof, under contest proceedings, either that the homesteader had changed his residence from the homestead to another place, or that he had abandoned the land for more than six months, would warrant the cancellation of an entry. But in the case here considered, where the entry was made under the act of June 6, 1912, *supra*, which provides for a forfeiture under a charge of

abandonment only where the land has been abandoned for more than six months at any time; the charge should have been laid and proved accordingly.

After a very careful consideration of the case under the appeal, the Department finds that the contest was premature. The decision of the Commissioner is accordingly affirmed.

VERDINE R. HALL.

Decided December 8, 1916.

STATES AND TERRITORIES—RIGHT OF STATE UNDER ACT OF AUGUST 18, 1894— OTHER TENDERED APPLICATIONS TO BE RECEIVED.

Under the act of August 18, 1894 (28 Stat., 372, 394), a right to select the land involved is given the State for a limited period, but such right does not exclude all other forms of appropriation, and applications tendered by others should not be rejected, but received and held suspended to await the event of the State's action.

VOGELSANG, *First Assistant Secretary*:

Verdine R. Hall has filed a petition for the exercise of the Department's supervisory authority in the matter of his homestead application 035062, for the S. $\frac{1}{2}$ Sec. 18, T. 37 N., R. 43 E., M. M., Glasgow, Montana, land district, which was ordered rejected by the Department's decisions [unreported] of July 28, 1916, and September 14, 1916. The matter has been orally argued.

The above township was reserved by the Commissioner of the General Land Office March 23, 1910, under the act of August 18, 1894 (28 Stat., 372, 394), subject to the right of the State from March 10, 1910, until 60 days after the filing of the plat of survey. The plat was approved November 12, 1914, and filed in the local land office May 17, 1915.

May 25, 1915, George E. Kennedy filed homestead application 033520 for the above tract, which was rejected the same day by the register and receiver because of the outstanding right of the State. June 4, 1915, the register and receiver revoked their order of rejection and suspended Kennedy's application. The State having failed to select the land, entry upon Kennedy's application was allowed July 16, 1915. July 17, 1915, Hall filed his application, alleging that he had settled upon the land June 5, 1915.

Counsel contends that during the 60-day period provided for in the act of August 18, 1894, *supra*, the land was absolutely withdrawn from appropriation, that Kennedy therefore gained no rights by the presentation of his application, and, while conceding that the land was not subject to settlement at the time Hall initiated his settlement, he further contends that Hall's settlement rights attached as soon as the

60-day period allowed to the State had expired. The argument of the counsel is based upon the phraseology of the act of August 18, 1894, *supra*, which directs that the Commissioner of the General Land Office, upon application of the governor of the State,—

with a view to satisfy the public-land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of the land called for thereby * * *

shall have a survey made. The land so surveyed—

shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants.

The act further requires that the State publish a notice—

to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands.

The argument of counsel is that this act reserves the land from any appropriation, that the right of selection by the State is exclusive of all other appropriations, and that the land does not become subject to disposition under the general laws until after the 60-day period of selection allowed to the State. In other words, the argument is that the act constitutes an absolute withdrawal of the land and does not create merely a preference right to the State.

The preceding act of March 3, 1893 (27 Stat., 592), provides that the States therein mentioned—

shall have a preference right over any person or corporation to select lands subject to entry by said States granted to said States by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States: *And provided further*, That such preference right shall not accrue against bona fide homestead or pre-emption settlers on any of said lands at the date of filing of the plat of survey of any township in any local land office, of said States.

The two acts were construed by the Department in *Northern Pacific Railway Company v. The State of Idaho*, Coeur d'Alene 02483, April 12, 1916 (45 L. D., 37). The Department there said:

Taking the two acts together it is clear that their purpose was to secure to the State the period of sixty days within which the State should have a right to select the land superior to all others. The act of March 3, 1893, speaks of this as a preference right. The act of August 18, 1894, directs that the land shall be reserved "from any adverse appropriation."

In the present case the selection filed by the railway company was first in time and it was then unknown whether the State would exercise its right or not. The rights of the State are fully protected by suspending the railway company's selection until the State selections have been fully adjudicated. Should the State have failed to make a proper selection there is no reason apparent why the railway company's selection, if otherwise valid, may not be allowed.

The purpose of the act of August 18, 1894, was to secure the survey of unsurveyed townships and to enable the States therein named to secure their full quota of the various grants made to them. The act reserves the land from other appropriation as against the right of the State to select, and the State has the exclusive right of selection as against all other persons. The act was not designed to affect the rights as between other individuals seeking to acquire public lands, and counsel here is endeavoring to invoke a statute, passed in the interest of various States, for the benefit of an individual who is not within the purview of that law. As stated in *Northern Pacific Railway Company v. Idaho*, *supra*, the rights of the State are fully protected by permitting it the first right of selection during the 60-day period. Should any other individual apply for the land in the meantime, his application can properly be accepted and suspended awaiting action by the State. Should the State fail to select the land, there is no reason why the intermediate application cannot be allowed.

Kennedy's application is admittedly prior in time to Hall's settlement, and he is accordingly prior in right.

The petition is accordingly denied.

SALES OF TIMBER ON UNRESERVED LANDS IN ALASKA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, December 14, 1916.

TO REGISTERS AND RECEIVERS AND SPECIAL AGENTS

OF THE GENERAL LAND OFFICE STATIONED IN ALASKA:

A general circular (No. 491), approved July 19, 1916, containing instructions relating to the acquisition of title to public lands in the Territory of Alaska, has been published, in which may be found information and rules and regulations covering the free use and purchase of timber under the provisions of Section 11, act of May 14, 1898 (30 Stat., 414).

The following instructions to registers and receivers and special agents stationed in the Territory of Alaska are hereby promulgated

for the purpose of aiding in the administering of timber sales pursuant to the aforesaid act:

1. *Applications.*—Applicants to purchase timber must file with the receiver of the United States Land Office for the district where the lands to be cut over are situated, an application properly executed, on Form 4-023. Copies of said form are to be furnished upon request, free of charge, to applicants by the registers and receivers, special agents, and United States commissioners stationed in Alaska. A deposit in the sum of \$50, or when the stumpage value, at the minimum rate of the material applied for is less than \$50, a deposit in the sum of the full stumpage value thereof, in the form of cash or currency, or of such certified check or post-office money order as receivers are authorized to receive under the act of March 3, 1913 (37 Stat., 733), and circular No. 228, approved April 25, 1913, must be made with every application as an evidence of good faith. If the applicant cuts the timber applied for, he will receive credit to the extent of the amount deposited toward the payment for said timber. If, however, no timber shall be cut under the application, or if a less amount of timber than shall have been paid for shall be cut, the sum deposited, or so much thereof as shall have been paid in excess of the stumpage value of the timber cut, will, at the direction of the Commissioner of the General Land Office, be returned to the depositor. The new rules and regulations (Circular No. 491) do not require an applicant to obtain a permit before he commences to cut the timber applied for. He is, however, required, additional to the filing of the application and making the initial deposit, to post a notice (Form 4-023c), before commencing to cut the timber applied for, in some conspicuous place on the land from which the timber is proposed to be cut. This is a necessary requirement which must be strictly adhered to. A blank form of notice (Form 4-023c) is to be inclosed with every application blank furnished to applicants.

2. *Action upon Application by Receiver.*—Receivers must keep a record in a book provided for the purpose of all applications by consecutive numbers, showing the description and location of the lands embraced in the applications with reference to creeks, rivers, islands, or other natural land marks, and if the land be surveyed, a pencil notation must be made upon the tract and plat books. Each application must also be made a matter of record in a card index to be kept by the receivers so that it may be readily identified in case there is any correspondence concerning it. Timber applications are not to be given serial numbers since this class of cases are given a special file number by the General Land Office, different from that of cases involving the entry and selection of public lands. There is, however, no objection to the use by receivers of the "Serial Number

Registers" sheets for their own records. Upon the first business day following the filing of an application, the receiver, retaining the remittance attached, if he knows of no adverse claim involving the land from which the timber is desired to be cut, or of no other reason why the application should be denied, will mail said application to the Chief of Field Division of the General Land Office of the Division embracing the Territory of Alaska, with a request that the truth of the application be inquired into, and that if thereupon there appears to be no reason for denying the application, an appraisal of the timber be made. Where such Chief of Field Division has designated a special agent near the land to make appraisements, the receiver will forward the application to said special agent direct, giving due notice thereof to the Chief of Field Division.

3. *Action upon Application by Special Agent.*—The special agent designated shall, as soon as practicable, if he knows of no reason why the application should not be allowed, investigate as to the truth of said application, and thereupon go upon the lands therein described and estimate and appraise the material applied for. If the said agent finds true the facts recited in said application, he will proceed as follows:

(a) Examine and if necessary, cause to be changed and properly marked, the boundaries of the land described in the application; ascertain whether or not the land is embraced within any reservation within which the cutting of timber is prohibited or within any settlement, mining or other claim, or within any homestead entry or any selection initiated prior to the date of the filing of the application and of the posting of the required notice upon the land, or within any approved allotment or any pending application for an allotment, or within the bona fide legal possession of or occupied by an Indian or Eskimo under the act of March 17, 1906 (34 Stat., 197), or within any section granted to the Territory of Alaska for educational or other purposes; take the affidavit (Form 4-023d), of the applicant or of some other person who can testify to the facts respecting the material features set forth in the application;

(b) Determine the kind, estimate the quantity, and appraise the stumpage price of the timber to be sold under said application;

(c) Prepare in triplicate a report addressed to the Commissioner of the General Land Office (Form 4-023a), transmitting therewith the original application. The report should refer to the application and should contain the agent's description of the land to be cut from, if other than that described in the application, and a statement to the effect that the applicant accepts such change in description; the kind, quantity, and stumpage value of the material cut or to be cut; and a statement that the applicant accepts the appraisal made by the special agent, and has delivered to the said special agent or trans-

mitted to the receiver of public moneys the appraised amount thereof, less the amount of the original deposit, in the form of such certified check or post office money order as a receiver is authorized to receive under the provisions of the act of March 3, 1913, supra, and of Circular No. 228, supra. Said certified check or post-office money order must be made payable to the receiver of the proper local land office. Special agents must issue, in duplicate, memorandum receipts on Form 4-023e, for all deposits submitted to them for timber sold under these rules and regulations, the originals to be handed at once to the payers and to be preserved by the latter until they shall have received the receiver's official receipts, and the duplicates to be transmitted to the receiver of public moneys as soon as opportunity will afford. They will also notify applicants that post office money orders or certified checks are not to be held as payment for timber until said money orders or checks are converted into cash by the receiver, and finally paid by the office or bank upon which drawn; that the Commissioner of the General Land Office also reserves the right to set aside a sale and to prevent further cutting under an application in cases in which it is ascertained that the land was not at the time of the filing of the application, subject to timber cutting under the act and in cases in which it is ascertained that the conditions of the sale are being materially violated. The special agent will deliver one copy of his report to the applicant. On the other two copies he will require the applicant's signature under proper date and endorsement: "Within amounts and conditions hereby accepted." One copy will be transmitted through the Chief of Field Division to the Commissioner of the General Land Office and the other copy will be retained in the office of the former. After the investigation and appraisal shall have been made, the special agent will, if he knows of no valid reason to prevent, issue a permit, Form 4-023b, authorizing the applicant to remove the timber. If the special agent shall at any time learn that a valid adverse claim which would prevent the allowance of the application, existed at the time that the application was filed or that the lands were not at that time subject to the provisions of the act, he shall at once notify the applicant thereof and direct that no further cutting be done if cutting had been commenced. The special agent shall at once submit a report to the Commissioner of the General Land Office setting forth fully the facts of the case.

4. *Appraisal by Special Agent.—Minimum Price.*—The person making the appraisal on behalf of the Government shall not in any event, unless in an exceptional case, appraise any timber suitable for saw timber or mine timbers at less than the following minimum rates: \$1 per 1,000 feet b. m. for Sitka Spruce, Hemlock, and Red Cedar; \$2.50 per 1,000 feet b. m. for Yellow Cedar; nor any piling 50 feet or less in length up to a top diameter of 7 inches, at less than one-half

cent per linear foot; nor any piling between 50 or 80 feet in length up to a top diameter of 8 inches at less than three-fourths cent per linear foot; nor any piling over 80 feet in length up to a diameter 8 inches at less than 1 cent per linear foot; nor any shingle bolts or cooperage stock at less than 50 cents per cord; nor any wood suitable only for fuel or mine lagging at less than 25 cents per cord. Subject to such minimum price, the agent will, in the absence of a competitive market, determine the stumpage value by deducting from the manufactured article the price for like material the cost of manufacture plus a fair profit upon the time and capital required to manufacture.

5. *Action by Special Agent When Investigation Can not be Made within a Specified time.*—If a special agent for any good and sufficient reason is unable to make the investigation and appraisal as required within 60 days after the filing of an application, he will, if he knows of no valid objection, give the applicant written permission (Form 4-023b), authorizing him to remove the timber described in the application. The applicant must, however, pay to the special agent or transmit to the receiver, the excess stumpage value over and above the sum originally deposited, where there is such excess, before he is authorized by the permit to remove the timber.

6. *Examination During and After Cutting.—Report.*—The rules and regulations promulgated pursuant to section 11, act of May 14, 1898, supra, set forth in Circular No. 491, require that the acquisition of timber thereunder shall be subject to the conditions that the applicant or his agent or employees will not cut any immature timber, and that the cutting of timber shall be done in such a manner as to prevent unnecessary waste; that all trees shall be utilized to as low a diameter in the tops as possible, and that stumps shall be cut as close to the ground as conditions will permit; that all brush, tops, lops, and other forest debris made in felling and removing the timber shall be disposed of as best adapted to the protection of the remaining growth and in such manner as shall be prescribed by the special agent who has charge of the investigation; that every precaution shall be taken by persons cutting under the application, to prevent forest fires, and that assistance will be rendered by them in suppressing forest fires within the described area. Special agents will endeavor to see that said conditions are fulfilled. At convenient times during cutting or after any sale, a special agent will examine the lands cut over and submit report as to compliance with the terms of the sale; or if cutting is being conducted in violation of the terms of sale, will immediately stop the cutting and report the matter to the Commissioner of the General Land Office, recommending appropriate action. When a homestead, mining or other claim shall have been initiated subsequent to the date of the filing of the application and of the posting

of the requisite notice upon the land, such homestead, mining or other claimant must take the claim subject to the rights of the timber applicant to cut and remove the amount of timber purchased under the terms of the application. In such cases the applicant must be required to comply strictly with the terms of the application, and the cutting of a greater amount of timber than that applied for will not be sanctioned.

7. *Granting Permission to Cut Timber within the Alaskan Timber Reserve No. 1.*—The Executive orders establishing Alaskan Timber Reserve No. 1, pursuant to the act of March 12, 1914 (38 Stat., 305), expressly state that such timber as shall not be needed by the Alaskan Engineering Commission for the construction of Alaskan Government-owned railroads, may be disposed of by the Secretary of the Interior. Persons desiring to exercise the free use, privilege, or to purchase timber within the reserve, must file applications setting forth therein that the timber is upon lands within said reserve and that the Alaskan Engineering Commission will consent to the taking of the timber by such applicants. Special agents, before issuing permits in this class of cases, must first ascertain that written consent from the Commission has been obtained.

8. *Disposition of Moneys by Receiver.—Receipts.*—When an application accompanied by the remittance mentioned in paragraph 1, supra, is received by the receiver of public moneys, he will immediately issue and forward to the applicant the usual form of receipt (Form 4-131) for the amount transmitted. The receipt must contain a full description of the money order or certified check with the words "Subject to collection." Such money orders or certified checks must be immediately deposited in the receiver's depository for collection, to be placed to his official credit, as "Unearned moneys—trust funds." When the appraised amount mentioned in subdivision (c) of paragraph 3 is received, the receiver will immediately issue an additional receipt therefor, with a similar notation as to the form of remittance and the words "Subject to collection." This remittance must also be immediately deposited for collection, to be placed to the receiver's credit, as "Unearned moneys—trust funds." When the receiver is notified by the Commissioner of the General Land Office that the sale is approved, he will immediately deposit the full amount earned, to the credit of the Treasurer of the United States and account for the same on Form 4-103f, using a blank column therefor, as "Sales of Public Timber—Act of May 14, 1898" (30 Stat., 414), and in the monthly and quarterly accounts current under the same title. The certificate of deposit must show the title of the fund and the act by which the money is covered into the Treasury and must be set out as a separate account on Form 4-106. (See instructions contained in paragraphs 96-101, inclusive, of Circular No. 105,

approved May 4, 1912.) Further receipts will not issue for the amounts when they are reported collected by the depository, but the applicant will be notified that the amount has been collected and that he is credited therewith.

9. *Commissions.*—On January 31, 1911, the Comptroller of the Treasury decided (17 D. C. T., 563) that registers and receivers are entitled to commissions (one per centum each on the cash value of the timber sold) on the sales of timber made pursuant to Section 11 of the act of May 14, 1898 (30 Stat., 414), in accordance with the provisions contained in paragraph 2, Section 2238, U. S. R. S. Registers and receivers are, therefore, entitled to deduct their commissions from the money received from Alaskan timber sales, provided that they have not at the time earned in fees and commissions, the sum of \$1,500 during the fiscal year in which the deposit is made (see section 12, 30 Stat., 414, and section 3, 34 Stat., 1232).

10. *Free Use of Timber for Army Posts and Other Governmental Purposes.*—Persons contracting with Government officials to furnish firewood or timber to the United States Army posts or for other authorized Government purposes in the Territory of Alaska, may procure such firewood or timber from the vacant unreserved public lands free of charge, provided that the contracts do not include any charge for the value of the firewood or timber. The filing of applications is not required but should be recommended in order that future charges of trespass may be avoided.

11. *Prior Circular Superseded.*—This circular of instructions together with the information and rules and regulations contained in Circular No. 491, supra, supersedes the rules and regulations contained in Circular No. 85, approved February 24, 1912 (40 L. D., 477).

Very respectfully, **CLAY TALLMAN,**
Commissioner.

Approved: **ALEXANDER T. VOGELSANG,**
First Assistant Secretary.

WILSON v. STATE OF NEW MEXICO.

Decided December 22, 1916.

STATES AND TERRITORIES—SCHOOL LANDS—CONFLICTING CLAIMS OF STATE AND SETTLER.

The provision in Sec. 3 of the act of May 14, 1880 (21 Stat., 140), limiting the time within which a settler must assert his claim to three months from the date of settlement when on surveyed land, or three months from the date of filing of the township plat when on unsurveyed land, was intended solely for the protection of the rights of settlers *as among themselves*, and is without application to conflicting claims of a settler and a State or railroad company under its grant.

SAME—CONFLICTING CLAIMS OF SETTLER AND CLAIMANT UNDER A GRANT—PUBLIC POLICY.

In the administration of the public land system, it is a fundamental principle that the settler shall be preferred over claimants who seek to assert scrip or other rights to the public domain, and in pursuance of this principle the Department will give equitable consideration to asserted settlement claims, in the presence of a scrip application for the land by one without claim to equitable consideration.

VOGELSANG, *First Assistant Secretary*:

The State of New Mexico has appealed from the decision of the General Land Office, rendered May 25, 1916, requiring it to show cause why its selection of the NW. $\frac{1}{4}$, Sec. 10, T. 3 N., R. 4 W., N. M. P. M., Santa Fe, New Mexico, land district, should not be canceled because of conflict with the claimed settler's right of Jay Wilson.

The State selected the land on July 30, 1915, as school land indemnity for losses of base lands in the Gila National Forest.

Wilson, on November 13, 1915, filed homestead application for the land, which application was rejected the same day, by the local officers, upon the ground of conflict with the State's selection. Wilson appealed to the General Land Office, and in such appeal alleged, under oath:

That said claimant was advised under date of February 5th, 1915, by the Register of the Santa Fe, N. M., land office that the land in question was vacant and subject to entry; that relying upon said information said claimant in good faith entered upon said land in question on or about the 15th day of June, 1915, and in pursuance of his intentions and good faith ploughed and cultivated about ten acres of said land raising good crops of corn and other farm products during the year 1915.

Upon consideration of the showing made by Wilson, the General Land Office called upon the State to show cause why its selection should not be canceled "because of Wilson's alleged prior claim to the land."

In the appeal from the Commissioner's decision, it is urged that Wilson acquired no right whatever to the land by virtue of the "occupation" he shows in his affidavit; and it is further contended that he failed to exercise his preference right, if such right he had, within the time allowed by law. These contentions will be considered in the inverse order of their presentation.

The provision in section 3 of the act of May 14, 1880 (21 Stat., 140), limiting the time within which a settler must make assertion of his claim to three months from the date of settlement when on surveyed land, or three months from the date of filing of the township plat when upon unsurveyed land, was intended solely for the protection of the rights of settlers *as among themselves*. It was never intended to have any application as between the conflicting claims of a settler and a State or railroad company under its grant.

In *State of South Dakota v. Thomas* (35 L. D., 171), involving a school indemnity selection in conflict with a settlement claim, it was said:

For the protection of other settlers under the public land laws, it is provided that those settling upon the public lands must make assertion of their claims within a given time or forfeit the same to the next settler in order of time who shall comply with all the provisions of the law, but this forfeiting provision in favor of the next settler in order of time has never been applied by this Department in favor of a grantee claimant.

See also *Lizzie Trask* (39 L. D., 279, 282-283).

In regard to the remaining contention of the State, namely, that Wilson is not a prior settler, it may be stated that in the treatment of settlement rights the guiding principle of the land department is that expressed in *Ard v. Brandon* (156 U. S., 537, 543): "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon." In the case of *Moore v. Northern Pacific Ry. Co. et al.* (43 L. D., 173), the Department said:

Our whole public-land system is based upon the fundamental consideration that the settler is to be preferred over claimants who seek to assert scrip or other rights to the public domain. Lands settled upon and claimed under the homestead law do not fall within the designation of public lands open to sale or other disposition under general laws other than those relating to settlement. This Department is not robbed of its jurisdiction and duty to give equitable consideration to asserted settlement claims by the tender of a scrip application for the land by one having no claim to equitable consideration.

In his appeal to the Department, Wilson states that he "in good faith entered upon said land * * * and in pursuance of his intentions and in good faith plowed and cultivated about ten acres." It is not clear, from this language, taken in connection with his acts, whether it was Wilson's intent to make the land his home, or whether, for instance, he merely intended to test the grain-growing capacity of the land, to be followed by residence if the results were favorable. In a letter to the Commissioner of the General Land Office, received April 28, 1916, he states that he would have filed his homestead application sooner, but, among other reasons, desired to ascertain whether the land was "suitable to a crop of grain." Whether he actually lived on the land after he "entered" thereon is not stated.

In view of the uncertainty as to whether Wilson has a settlement right to the land, the case is remanded to the General Land Office with direction that he be called upon to make a statement, under oath and duly corroborated, setting forth fully the circumstances upon which he bases his claim as a settler, a copy of which should be furnished the State, with opportunity afforded it to make reply. The case will then be adjudicated in the light of the additional evidence presented.

The decision appealed from is modified to this extent.

**LAND IN CERTAIN COUNTIES IN NORTH DAKOTA, SOUTH DAKOTA,
AND KANSAS NOT SUBJECT TO DESIGNATION UNDER THE EN-
LARGED HOMESTEAD ACT.**

CIRCULAR.

[No. 517.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 26, 1916.

REGISTERS AND RECEIVERS,

*United States Land Offices, Arizona, California, Colorado,
Kansas, Montana, Nevada, New Mexico, North Dakota,
Oregon, South Dakota, Utah, Washington, and Wyoming.*

SIRS: Under date of December 21, 1916, the Secretary of the Interior issued the following order:

As a result of the passage of the act of July 3, 1916 (39 Stat., 344), it has become possible for applicants to make additional homestead entries in the arid portions of the States subject to the act, based on original homesteads situated in the more humid eastern portions of North Dakota, South Dakota, and Kansas.

The Director of the Geological Survey advises that in his opinion lands in the counties in those States hereinafter listed can not properly be regarded as arid lands subject to the operation of the enlarged homestead act. You are accordingly directed to advise local land officers in the States mentioned that lands in these counties will not be designated under the act of February 19, 1909 (35 Stat., 639), and that all entries and applications to make entry, the allowance of which would be conditional upon the designation of lands in these counties, should accordingly be rejected.

The list of counties is as follows:

North Dakota.—Barnes, Benson, Bottineau, Cass, Cavalier, Dickey, Eddy, Foster, Grand Forks, Griggs, Lamoure, McHenry, Nelson, Pembina, Pierce, Ramsey, Ransom, Richland, Rolette, Sargent, Sheridan, Steele, Stutsman, Towner, Traill, Walsh, Wells.

South Dakota.—Aurora, Beadle, Bonhomme, Brookings, Brown, Brule, Buffalo, Charles Mix, Clark, Clay, Codington, Davison, Day, Deuel, Douglas, Edmunds, Faulk, Grant, Hamlin, Hand, Hanson, Hutchinson, Hyde, Jerauld, Kingsbury, Lake, Lincoln, McCook, McPherson, Marshall, Miner, Minnehaha, Moody, Roberts, Sanborn, Spink, Turner, Union, Yankton.

Kansas.—Allen, Anderson, Atchinson, Barber, Barton, Bourbon, Brown, Butler, Chase, Chautauqua, Cherokee, Clay, Cloud, Coffey, Comanche, Cowley, Crawford, Dickinson, Doniphan, Douglas, Edwards, Elk, Ellis, Ellsworth, Franklin, Geary, Greenwood, Harper, Harvey, Jackson, Jefferson, Jewell, Johnson, Kingman, Kiowa, Labette, Leavenworth, Lincoln, Linn, Lyon, McPherson, Marion, Marshall, Miami, Mitchell, Montgomery, Morris, Nemaha, Neosho, Osage, Osborne, Ottawa, Pawnee, Phillips, Pottawatomie, Pratt, Reno, Riley, Rooks, Rush, Russell, Saline, Sedgwick, Shawnee, Smith, Stafford, Sumner, Wabaunsee, Washington, Wilson, Woodson, Wyandotte, Republic, Rice.

Inclose a copy hereof with all notices of rejection hereunder.

Very respectfully,

CLAY TALLMAN,

Commissioner.

JEANNOT v. MAST.*Decided September 12, 1916.***SETTLEMENT—RESIDENCE PENDING DETERMINATION OF RIGHT.**

To preserve his rights as against an adverse claimant a settler must maintain residence upon the land pending determination of the conflicting claims.

SIMULTANEOUS SETTLEMENTS—RESIDENCE, CULTIVATION, IMPROVEMENT.

In a controversy involving simultaneous settlement claims the land in conflict should not be awarded to one of the parties merely because he has shown a higher degree of diligence in subsequent residence, cultivation, and improvement, where both parties in good faith made and have maintained their settlement claims.

ACTUAL SETTLEMENT—CONSTRUCTIVE SETTLEMENT—EQUITIES.

One who in good faith makes actual settlement on a forty-acre legal subdivision has an equitable right thereto superior to that of one who claims the same tract by virtue of simultaneous settlement on an adjoining forty-acre legal subdivision in the same technical quarter section.

VOGELSANG, *First Assistant Secretary.*

Louis H. Jeannot appeals from the decision of the Commissioner of the General Land Office of November 18, 1915, rejecting his application to make homestead entry for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13, T. 19 N., R. 21 W., M. M., Missoula, Montana, land district, and holding intact Clyde J. Mast's homestead entry including said tract.

This land was formerly part of the Flathead Indian Reservation and was restored to entry September 29, 1914.

At the opening of the local land office at 9 o'clock a. m., September 29, 1914, both Jeannot and Mast were present waiting to file their homestead applications, the former for the S. $\frac{1}{2}$ and the latter for the E. $\frac{1}{2}$ of said Sec. 13, their applications being in conflict as to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$. Mast succeeded in getting his application in the hands of the local officers first, and entry was allowed thereon. Jeannot's application, shortly thereafter presented, was rejected as to the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, of said Sec. 13, because that tract was not open to entry, and as to the tract in conflict because of Mast's entry theretofore allowed. Jeannot thereupon filed affidavit alleging settlement on the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ immediately after 12 o'clock on the morning of September 29th, and Mast also filed affidavit alleging settlement immediately after 12 o'clock.

As a result of a hearing on the conflicting allegations of settlement, the local officers found that the settlements of Mast and Jeannot were simultaneous, and recommended that the entry of Mast be canceled as to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, in conflict, and that Jeannot's application be allowed as to that tract. Mast appealed, and the Commissioner, in the decision now appealed from, concurred in the finding of the local officers that the conflicting settlements were simultaneous, and also found that under the circular of March 22, 1914 (43 L. D.,

254), the applications of Mast and Jeannot were simultaneous, and thereupon, considering the showing as to residence and improvements made on behalf of the conflicting claimants, held that Mast had the better right to the tract in conflict, reversed the local officers, and held Mast's entry intact.

The Commissioner in the decision appealed from states the question involved as follows:

The applications to enter having been filed simultaneously, as well as making settlement, the rights of the parties depend upon the question of maintenance of settlement and residence.

In the brief to support the appeal, counsel for Mast states:

With the Commissioner's decision as to the settlements and the entries being simultaneous, agreed to by the man who appealed, we come to the question upon which the Commissioner based his decision and which is the vital question in this case, namely: *Which of these claimants has best complied with the law as to the maintenance of residence upon this land during the pendency of this controversy, and in that respect best shown his good faith and his purpose to make this tract his home to the exclusion of a home elsewhere.*

After careful examination of the record, the Department concurs in the findings below that the settlements and applications of the contending parties were simultaneous, but is unwilling to hold that the rights of the parties shall be determined on the question as to which has shown the higher degree of diligence in the maintenance of residence subsequent to the initiation of their settlement claims and during the pendency of this controversy. This case involves conflicting settlements. While the Department has frequently held that in a controversy involving a settlement claim the settler must, in order to maintain his claim, continue residence upon the land pending determination of the question of superior right (*Shaw v. Russell*, 38 L. D., 275; *Pounder v. Allen*, 39 L. D., 348; *Lias v. Henderson*, 44 L. D., 542), it does not hold, that as between two conflicting settlement claims, the question as to which settler has the superior right depends upon which of the parties has subsequent to the initiation of his settlement claim shown the higher degree of diligence in the matter of residence. Residence in such a case is material only in so far as it tends to show maintenance of the settlement claim and the good faith of the settler. If both settlers are acting in good faith and each has maintained his settlement claim by residence of such character as would be satisfactory under the homestead laws, the fact that one of the settlers may have remained more continuously upon the land and made greater improvements thereon, is not in itself necessarily evidence that he is acting in better faith nor sufficient to give him the superior right.

The record shows that Mast initiated his settlement on the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, of said Sec. 13, immediately after 12 o'clock on the morning

the land was restored to settlement and entry. He followed up his settlement by erecting a good house and establishing his residence therein, where he has since resided with his family. He has erected a barn and other outbuildings and has fenced his claim and cultivated part thereof. He also has upon the land horses, cattle, hogs and chickens. The only improvements he has placed on the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, the tract here in dispute, are fencing and some breaking.

Jeannot followed up his initiatory acts of settlement by the erection of a small house in which he testifies he established residence about the middle of October—within two weeks after making his settlement. In February following he built a more substantial house, combining the old structure with the new. In addition to the house, he has a small barn, has set out a few fence posts, and has a large number of other fence posts on the ground ready to fence the tract if this controversy shall be settled in his favor. He testifies that he has not heretofore built a fence around the tract for the reason that Mast had already fenced it and he considered it would be merely child's play to build another fence paralleling the one already there. He has in the house a heating and a gasoline stove, bed, bedding, dishes, trunk and other household utensils, together with his own and his wife's apparel.

The record clearly shows that Jeannot has not remained on the land continuously since establishing his residence. During the first three or four months he was on the land frequently, at least every week and sometimes several days a week. On these occasions he stayed there at night, sometimes his wife being with him and sometimes not. For some time prior to the hearing, he testifies that he lived practically continuously on the land, his wife being with him most of the time. He testifies that his absences from the land were necessary for the purpose of attending to his business affairs.

Prior to making his settlement on this land, Jeannot lived in the town of Dixon, eleven miles from this tract, in a house belonging to his wife, in which town he conducted a mercantile business. He still owns and conducts this business, and the house in which he and his wife formerly resided has been rented, partly furnished. It also appears that six days after making his settlement on this land he voted in the town of Dixon.

Much stress is placed in argument on these facts as demonstrating his bad faith. It is hardly reasonable to expect any ordinarily prudent man making a homestead settlement to close out all his business affairs, dispose of his former residence, and sell all his furniture, while the tract upon which he made settlement is still in dispute and it is uncertain whether he will be allowed to make entry thereof. In explanation of his vote in the county in which he formerly resided,

he says that he understood that he had a right to vote somewhere, and as he had not acquired a voting residence in the county in which the land in question is situated, he thought, and was informed, that he had a right to vote in the county in which he was registered. The mere fact of voting in another county is not proof of residence in that county.

It is hardly fair in this case to determine the question whether Jeannot in good faith made and has maintained his settlement claim, by a comparison of the acts of Jeannot with the acts of Mast. Mast made his improvements and maintained his settlement on the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ —*a tract as to which there is apparently no dispute*. Everything he did thereon was with full knowledge that he was perfectly safe in doing it. He was taking no risk of losing his improvements by any possible adverse decision. On the other hand, Jeannot's settlement, improvements, and residence were upon the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ —*the tract here in controversy*. Everything he did was with full knowledge that the land, together with the improvements he placed thereon, might be lost to him by adverse decision. Under these circumstances, and considering further that the six months elapsing between his settlement and the hearing covered the winter season, when little could be done upon the land, the Department is not willing to hold that Jeannot was acting in bad faith in making and maintaining his settlement claim, merely because he has not shown the same degree of diligence in the matters of residence and improvements as has Mast. His residence and improvements were amply sufficient to maintain his settlement, if made in good faith. Good faith is always presumed, and bad faith should not be lightly imputed to any one. The Department is unwilling to hold, from the facts shown in this record, that Jeannot was not acting in good faith in making and maintaining his settlement.

As before stated, the settlements of Mast and Jeannot were simultaneous and their applications were simultaneous. Mast, therefore, has no advantage by reason of the fact that his application was first received by the local officers and entry thereon allowed and Jeannot's application for that reason rejected as to the tract in conflict. Mast and Jeannot would, therefore, seem to stand on an exact equality so far as their legal rights are concerned. Under such circumstances the Department may properly take into consideration the equities of the parties.

It is apparent that one who in good faith makes actual settlement on a 40-acre legal subdivision has an equitable right thereto superior to that of one who claims the same tract by virtue of simultaneous settlement on an adjoining 40-acre legal subdivision in the same

technical quarter section. As well said in *Fowler v. Dennis* (41 L. D., 173):

It must be conceded that one who makes actual settlement, in good faith, upon a 40-acre subdivision of the public domain has an equitable right thereto superior to the claim of one who settled, at the same time, upon another legal subdivision, even though a part of the same technical quarter section, and relies upon the claim that a settlement extends to the entire quarter section. The rule that protects a settler upon one subdivision of a quarter section against encroachment by others, based upon the doctrine of notice imparted, can have no possible application to a case like this where the settlements were simultaneously made at midnight; and to give a party whose claim, as to three of four subdivisions, is dependent upon such notice, the home and improvements of his adversary, merely because of the allowance of the entry of the one and the denial of the application of the other, would be to disregard any settlement rights and give to a mere technicality and a negligible fact the controlling weight in a controversy where the equities of the parties should prevail.

The decision appealed from is reversed and the action of the local officers recommending cancellation of Mast's entry as to the tract in controversy and awarding the same to Jeannot, is sustained.

JEANNOT v. MAST.

Motion for rehearing of departmental decision of September 12, 1916, 45 L. D., 586, denied by First Assistant Secretary Vogelsang, December 18, 1916.

STATE OF WYOMING.

Decided October 25, 1916.

SCHOOL INDEMNITY SELECTION—MINERAL LAND.

Title does not vest in the State under a school indemnity selection until the selection has been duly approved; and a discovery of mineral prior to such approval will defeat the selection.

SWEENEY, Assistant Secretary:

April 4, 1912, the State of Wyoming filed indemnity school land selection list No. 180, serial 05521, at Lander, Wyoming, embracing the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 19, T. 46 N., R. 98 W., 6th P. M. This land was included in Petroleum Reserve 32, by Executive order of May 26, 1914, made under the act of June 25, 1910 (36 Stat., 847).

July 29, 1915, the Commissioner directed the register and receiver to call upon the State either to apply for a classification of the land as nonmineral or to file its election to take a surface patent under the act of July 17, 1914 (38 Stat., 509). The State failed to file an application for a nonmineral classification and declined to take a patent as provided for under the act of July 17, 1914, *supra*. The selection was then held for cancellation by the Commissioner in a

decision dated August 17, 1916, from which an appeal to the Department has been perfected.

The State contends in effect that having done all that it was required to do when the selection was filed, equitable title vested in it from that date and the later discovery that the land is valuable for oil does not interfere with its rights to secure patent for the land in fee instead of the surface patent provided for in the act of July 17, 1914, *supra*. The appellant further states in its brief—

No fault on the part of the State is suggested in any particular regarding the selection here in question. It is not even alleged, more or [much] less shown, that this tract was of known mineral character at the time the selection was filed. In fact, we believe it will be conceded that it was not of known mineral character when the State's selection was filed, and that said selection was filed in entire good faith, without regard to the oil since shown to be in valuable quantities beneath its surface.

In support of the State's contentions the cases of *Kern Oil Company et al. v. Clarke* (30 L. D., 550), and *Daniels v. Wagner* (237 U. S., 547), are cited.

Kern Oil Company et al. v. Clarke involved forest reserve lieu selections under the act of June 4, 1897 (30 Stat., 11, 34-6), as amended by the act of June 6, 1900 (31 Stat., 588, 614). Particular attention is called to the Department's statement at page 556—

that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

It is sufficient to point out that *Kern Oil Company et al. v. Clarke*, as far as the question here involved is concerned, was in effect overruled by the decisions in *Miller v. Thompson* (36 L. D., 492), and *Thomas B. Walker* (36 L. D., 495), in which reference was made to the cases of *Cosmos Company v. Gray Eagle Company* (190 U. S., 301), and *Clearwater Timber Company v. Shoshone County* (155 Fed. Rep., 612).

In *Daniels v. Wagner* the appellant calls particular attention to the third paragraph of its syllabus—

One who has done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right from the Land Office conferred upon him by Congress, cannot be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Officers.

Daniels v. Wagner involved the rights of a forest reserve lieu selector under a prior selection as against individuals who received patent under subsequent homestead and timber and stone entries. The land department there had claimed the right under its discretionary power to reject a prior forest reserve lieu selection and patent the land to subsequent claimants. This the Supreme Court held

was beyond its power. The case in no wise involved the question as to the character of the land, in fact at page 561, the Court expressly refers to this prior decision in *Cosmos Company v. Gray Eagle Oil Company*, *supra*, stating that it had there declined to hold that the land department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its final allowance.

The grant to the State of Wyoming was made by the act of July 10, 1890 (26 Stat., 222). Section 4 states that the indemnity lands are to be selected within the State in such manner as the legislature may provide "with the approval of the Secretary of the Interior." Section 13 provides "that all mineral lands shall be exempted from the grants made by this act." Section 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), provides that indemnity selections shall be made "from any unappropriated surveyed public land, not mineral in character."

The Department has uniformly held that no title is acquired by a school indemnity selection until it has been duly approved. See *Tonner v. O'Neill* (15 L. D., 559); *Todd v. State of Washington* (24 L. D., 106); *Kinkade v. State of California* (39 L. D., 491); *State of California et al.* (41 L. D., 592); Administrative Ruling of July 15, 1914 (43 L. D., 293). In *Kinkade v. State of California*, the second paragraph of the syllabus reads:

No title is acquired under or by virtue of a school indemnity selection until the same has been duly approved and certified, and prior thereto a disclosure that the land is mineral will defeat the selection.

The above statement of the law is also given by Lindley (Lindley on Mines, 3d edition, section 143), as follows:

Be this as it may, until the selection is finally approved by the officers of the government charged with this duty, and the land is certified or listed to the state, the state has no title which it can convey to the purchaser.

Without such approval, neither the state nor its grantee can question any further disposition which the United States may make of the land embraced in the attempted selection.

Among the supporting cases cited by Lindley is that of *Wisconsin Central Railroad Company v. Price County* (133 U. S., 496), which involved a railway indemnity selection. The Supreme Court there stated at page 513—

The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by the statute, by the Secretary of the Interior.

Under the above authorities the Department is of the opinion that it can not be questioned that title does not vest in the State under a

school indemnity selection until said selection has been duly approved, and that a discovery of mineral, prior to such approval, will defeat the selection. Such selections are restricted to nonmineral land and the duty is imposed upon the Secretary of the Interior to ascertain such character before giving his approval, and it being ascertained in this case that the land is in character mineral, the selection can not be approved.

The decision of the Commissioner is accordingly affirmed.

STATE OF WYOMING.

Motion for rehearing of Department's decision of October 25, 1916, 45 L. D., 590, denied by First Assistant Secretary Vogel-sang, February 17, 1917.

STATE OF WASHINGTON v. LYNAM.

Decided December 20, 1916.

SCHOOL LANDS—GRANT TO STATE OF WASHINGTON—IDENTIFICATION BY SURVEY.

The State of Washington acquires no vested right or title under the grant of sections 16 and 36 made to said State, for school purposes, by the enabling act of February 22, 1889 (25 Stat., 676), until said sections have been identified by survey.

SCHOOL LANDS IN NATIONAL FOREST—UNSURVEYED WHEN RESERVATION ESTABLISHED—APPLICATION UNDER ACT OF JUNE 11, 1906.

Where school sections, prior to public survey, are included within a national forest, they may be administered in all respects as are other lands within the reservation, and are subject to entry under the provisions of the act of June 11, 1906 (34 Stat., 233).

HOMESTEADS IN NATIONAL FORESTS—APPLICATION TO MAKE ENTRY—WHEN CLAIM INITIATED.

The act of June 11, 1906 (34 Stat., 233), awards one who has applied for the listing of lands in a national forest merely "a preference right of *settlement and entry*," and no claim under such act is initiated until the Secretary of Agriculture has listed the land for entry, such list has been filed in the local land office, publication thereof made, and the application to enter filed by the applicant for the listing.

SAME—RIGHT OF STATE ON RESTORATION TO ENTRY OF SURVEYED LANDS—APPLICATION TO MAKE HOMESTEAD ENTRY.

Upon elimination from a national forest of surveyed school lands, the right of the State under its grant attaches immediately and is paramount to an application to make entry, tendered by the applicant for the listing after the land has been opened to entry, which opening is subsequent in time to the elimination of the land from the national forest.

VOGELSANG, *First Assistant Secretary*:

March 24, 1913, James W. Lyman made homestead entry 05058, at Vancouver, Washington, under the act of June 11, 1906 (34 Stat., 233), for a tract of 45 acres described as follows:

The E. $\frac{1}{2}$ E. $\frac{1}{2}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ E. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ E. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 16, T. 13 N., R. 9 E., W. M., within the Mt. Rainier National Forest.

The above land was placed within the national forest by proclamations of February 20, 1893 (27 Stat., 1063), and February 22, 1897 (29 Stat., 896), and by act of June 4, 1897 (30 Stat., 11, 34). The land was surveyed in the field September and October, 1903, the plat being approved June 24, 1904. The State of Washington filed a protest against the allowance of Lynam's entry upon the ground that said section 16 was granted to the State by the act of February 22, 1889 (25 Stat., 676). The State's protest was dismissed by decision of the Commissioner of the General Land Office, dated August 17, 1916, from which the State has appealed to the Department.

The State first contends that under its grant, title to both surveyed and unsurveyed school sections vested at the time of the passage of the act of February 22, 1889, citing in support of its contention the decision of the Supreme Court of Washington in *State v. Whitney*, 120 Pac. Rep., 116. This contention on the part of the State is foreclosed against it, as far as this Department is concerned, by prior decisions of the Secretary of the Interior. (See *State of Montana*, 38 L. D., 247; *State of Washington v. Geisler*, 41 L. D., 621; *Fannie Lipscomb*, 44 L. D., 414.)

The State next asserts that, waiving the above contention, the allowance of Lynam's entry was erroneous, since the land had been identified as a school section by survey prior to Lynam's application, relying in this respect upon language contained in section 10 of the act of February 22, 1889, *supra*, being the proviso thereof:

Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.*

The State's argument appears to be that title in it vested by the survey subject to the forest reservation, which title becomes absolute when the reservation is extinguished and the land restored to the public domain. The particular area here involved was eliminated from the forest by Executive Order No. 1908, dated March 28, 1914, which directed that the land should be opened to settlement May 9,

1914, and to entry under the general public land laws beginning June 8, 1914.

In State of Montana (38 L. D., 247), the Department said of a similar grant to the State of Montana:

It will thus be seen that the grant to the State of Montana, like school grants made to other States, while a grant *in praesenti* did not attach to any particular tract of land until it was surveyed; that if prior to such survey, that is, prior to the date when that survey is officially approved, Congress, or some officer of the Government acting under the authority of Congress, should make other disposition of the land, the right of the State to that particular section is thereby defeated; otherwise it would have been useless for Congress to make any provision whatever for the taking of indemnity.

* * * * *

In view of these considerations this Department is of the opinion that the land involved herein was legally included in the forest reserve prior to its survey, and that the State's title does not attach until the reservation is extinguished and the land restored to the public domain. However, under the terms of the act of February 28, 1891, *supra*, the State, without awaiting the extinguishment of the reservation, may immediately avail itself of the privilege of taking indemnity for the lands so reserved.

The precise question was also determined adversely to the contentions here made by the State, in Black Hills National Forest (37 L. D., 469), which held that where unsurveyed school sections were placed in a national forest, such sections may be administered by the forest service in all respects as other lands in the reservation, the precise question there involved being also the opening to entry of lands within a school section under the act of June 11, 1906, *supra*. As far as Lynam's entry, No. 05058, is concerned, the decision of the Commissioner is correct and is hereby affirmed.

Upon January 9, 1914, the Secretary of Agriculture requested that the following land, embraced in the above section 16, be opened to entry under the provisions of the act of June 11, 1906:

W. $\frac{1}{4}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$; W. $\frac{1}{4}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$; NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$; S. $\frac{1}{4}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$; SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$; SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$; W. $\frac{1}{4}$ E. $\frac{1}{4}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$; W. $\frac{1}{4}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$; Lot 2; E $\frac{1}{4}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$.

The register and receiver were directed February 28, 1914, to post and publish notice, beginning March 19, 1914, that the above tract would be opened to settlement and entry, May 19, 1914. The listing by the Secretary of Agriculture was upon the request of Lynam who, upon May 20, 1914, made homestead entry No. 05294, as additional to his entry No. 05058, under the act of April 28, 1904 (33 Stat., 527). The Commissioner held that the same reasoning applied to Lynam's additional entry as to the original and directed that it remain intact. In this holding the Department is unable to concur.

The President's order of March 28, 1914, eliminated this land from the national forest. It provided, under authority of the act of September 30, 1913 (38 Stat., 113), that the land should become subject to

settlement May 9, 1914, until and including June 7, 1914, and thereafter to entry under the public land laws. It warned all persons to refrain from any acts of settlement prior to May 9, 1914, except those who had valid subsisting settlement rights, initiated prior to the reservation of the land as a national forest "and those having preferences to make entry under the provisions of the act of Congress approved June 11, 1906 (34 Stat., 233)." Persons having such preference rights of entry under the order would be allowed to make entry "in conformity with existing law and regulations." The order of March 28, 1914, therefore, extinguished the forest reserve, restored the land to the public domain, and also provided the method by which those lands should become subject to disposition. The title of the State of Washington, therefore, immediately attached, unless there was some valid prior right outstanding at the time of the exclusion of this tract from the national forest.

The act of June 11, 1906, awards a person who had applied for the listing of the land "a preference right of settlement and entry." At the time these lands were eliminated from the forest they had not yet become subject to settlement or entry by the applicant under the act of June 11, 1906. He merely had a preference right of entry in the event that such lands became subject to settlement and entry. Further, in the case of J. Paul Holden, 43 L. D., 525, the Department held that under the act of June 11, 1906, no claim to the land is initiated until the Secretary of Agriculture has listed the land for entry, such list has been filed in the local land office, publication thereof made, *and the application to enter filed by the applicant for the listing.* Before Lynam's application to make additional entry was presented, title to the land had vested in the State under its school land grant. As to the additional entry, therefore, the Commissioner's decision is reversed and the additional entry will be canceled.

STATE OF WASHINGTON v. LYNAM.

Motion for rehearing of Department's decision of December 20, 1916, 45 L. D., 593, denied by First Assistant Secretary Vogelsang, February 16, 1917.

STANLEY MYERS.

Decided December 20, 1916.

VACATION OF PATENT—NOTATION OF CANCELLATION UPON RECORDS—APPLICATION TO MAKE ENTRY.

The legal effect of cancellation of a patent to public land by final decree of a proper tribunal is to revest title in the Government and restore the land to the public domain; but such cancellation does not *ipso facto* restore the land to entry, and, until notation of the cancellation upon the records of the local land office, no rights are acquired by the filing of an application to make entry.

RELINQUISHMENT—CANCELLATION UPON RECORDS—APPLICATION.

While cancellation, by final decree, of a patent to public land, does not operate to restore said land to entry, the act of May 14, 1880 (21 Stat., 140), requires that upon the *filing of a relinquishment* the land involved shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

VOGELSANG, *First Assistant Secretary*:

This is an appeal by Stanley Myers from the Commissioner's decision of July 27, 1916, affirming the rejection by the register and receiver of his timber and stone application, 015842, La Grande, Oregon, land district, filed May 5, 1916, to purchase the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 6, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, T. 10 S., R. 37 E., for the reason that the land was covered by patent to one Rose A. Call.

It is contended that as a result of the cancellation of the patent by decree of the United States District Court for the district of Oregon, the land was subject to entry at and on the date of the filing of the application aforesaid.

The cancellation of a patent by the judgment of a proper tribunal is ineffectual to restore the land to entry, the only effect of the judgment being to revest title in the Government and restore the land to the public domain, and no rights are acquired thereunder by filing of an application to make entry until the cancellation has been noted on the records of the local land office.

This question was under consideration in the case of Hiram M. Hamilton (38 L. D., 597), at which time it was held:

While the legal effect of a final decree canceling a patent is to revest title to the land in the Government and restore it to the public domain, nevertheless the records in the land department still bear the memorandum of the entry and, as it would appear, should be corrected to show the cancellation before other entry of the land is allowed, in the interest of orderly administration.

In the case of Sarah V. White (40 L. D., 630), the facts therein appearing are similar to the situation presented in the case now under consideration. White's application was rejected because the land had been patented to one Sadie E. Puter. This patent had been canceled by a decree of the United States Circuit Court of Oregon. The decision recited that—

By a final decree of cancellation the patented land once patented becomes part of the public domain, subject to settlement, like unsurveyed or surveyed public lands, if unappropriated, but does not become subject to entry until opened to entry by the General Land Office. Until said order of restoration and opening to entry, land once patented is *sub judice*, either in the courts or, after evidence of cancellation of patent, in the land department, to determine the propriety of its disposal under the public land laws. * * *

This case was cited and quoted with approval by the Department in its decision of October 30, 1916, in the case of Michael Kelley.

In the case of *Stewart v. Peterson* (28 L. D., 515), the rule was announced that—

In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office.

The cases of *O'Shee v. La Croix* (34 L. D., 437), and *Fredrek Steebner* (43 L. D., 263), cited by the appellant, are not in conflict with the rule thus announced. In those cases, the Department had the rule under consideration upon the question of relinquishment, and it was properly stated and held in the *O'Shee v. La Croix* case:

Where proceedings are instituted on behalf of the Government solely for the purpose of clearing the record of an existing entry, no question of a preference right is involved, and where a relinquishment is subsequently filed and there are no valid adverse rights outstanding, the rule that no application to enter shall be received until proper notation of the cancellation of the entry is made upon the records of the local office, has no application

for the reason that—

On the filing of such relinquishment, by operation of law the entry was canceled and no further action was necessary to effect that end. The making of the notation thereof was purely a ministerial act and it was clearly the duty of the local officers to promptly perform it.

Thus it is seen that the case deals solely with the question of relinquishment, the filing of which is made by the act of May 14, 1880 (21 Stat., 140), "the equivalent of cancellation" (*David H. Merryman*, 1 L. D., 121); and in the case of *Hiram M. Hamilton*, *supra*, it was said:

The local officers have no authority, in the absence of express directions from your office, to note cancellation of entries appearing intact upon their records, with the exception that upon the filing by an entryman of a relinquishment of his entry, the register and receiver are empowered to cancel the relinquished entry and thereupon to receive applications for the land, if the rights of third parties are not affected.

In the case of *California and Oregon Land Company et al.* (33 L. D., 595), where, as in the *Fredrek Steebner* case, *supra*, the relinquishment was accompanied by application, it was said:

Where a relinquishment of all right to a tract of land is tendered, and there is filed therewith and as a part of the same transaction an application, by or in the interest of the person relinquishing, to make some other appropriation of the same land, the relinquishment must be regarded, for all purposes of such application, as in force at the moment of its presentation, but not effective as to the public generally, so as to make the land subject to other appropriation, until the application is considered and disposed of.

Thus it is seen that the act cited *supra* has been construed to mean that a relinquishment, when filed, is equivalent to cancellation, and takes effect and operates *eo instanti* to release the land from the

effect of the filing or entry, and the subsequent notation of the relinquishment on the records of the General Land Office is merely a clerical act. But the question of relinquishment and the rulings of the Department thereon have no application in the present and like cases, as pointed out.

For the reasons stated, the land in question was not subject to entry, and the action of the Commissioner in sustaining the local officers in denying the application was proper and correct.

The decision is, therefore, affirmed.

STANLEY MYERS.

Motion for rehearing of Department's decision of December 20, 1916, 45 L. D., 596, denied by First Assistant Secretary Vogelsang, February 9, 1917.

MARGARET S. WITMAN (On Rehearing).

Decided January 10, 1917.

DESERT-LAND APPLICATION—LAND COVERED BY WATER.

Where land, at the time of application therefor under the desert-land law, is practically all covered by the waters of the Salton sea, such application should be rejected.

Vogelsang, First Assistant Secretary:

October 17, 1916, the Department, on appeal, affirmed the action of the Commissioner of the General Land Office, rejecting the desert-land application of Margaret S. Witman for the N. $\frac{1}{2}$ Sec. 12, T. 12 S., R. 11 E., S. B. M., Los Angeles, California, land district, because the land at the time of the application was covered by the waters of the Salton Sea. A motion for rehearing has been filed.

It was urged by the applicant that other applications have been allowed for lands similarly situated and that no reason appears why discrimination should be made in this case. In reply to this contention it is sufficient to say that the Department has not sanctioned the allowance of desert-land entry for lands covered by these waters. In some cases, where entry was erroneously allowed at a time when the land was still submerged but at the time of consideration of the entry by the Department the waters had partially or wholly subsided, such entry has been allowed to stand. However, in the particular case referred to by this claimant in her brief, the entry of Tousley was canceled for failure to comply with law.

It was found that under the former practice, many entries were allowed upon the showing made by the applicant for lands not

properly subject to entry, and the practice was for that reason changed, so that now such entry is not to be allowed until investigation has been made in the field by a special agent and report as to the propriety of allowing such entry. This practice was adopted for the protection of the entrymen, as well as the Government.

The Department concurs in the action rejecting this application, as the land at the time of the application was practically all covered by the waters of the Salton Sea, and no reason is seen for disturbing the departmental decision complained of. The applicant's right, in all cases, is dependent upon the status of the land when the application is presented.

In the motion for rehearing it is alleged that there are now 150 acres of the westerly portion of the land entirely free from the waters of the Salton Sea. If this be true and if all of any subdivision or subdivisions is free from the waters at this time, the applicant should file a new application therefor, if she desires to make entry for such tracts as may now be subject to entry. However, before any entry is allowed the land should be examined in the field in accordance with the instructions of May 18, 1916 (Circular No. 474), 45 L. D., 345.

The motion is accordingly denied.

**PATENTS IN FEE—ALLOTTED LANDS—LIEN CHARGE RECITED IN
PATENTS—BLACKFEET, FORT PECK, FLATHEAD, OKANOGAN,
AND YAKIMA IRRIGATION PROJECTS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, January 11, 1917.

THE SECRETARY OF THE INTERIOR,

SIR: In the Indian Appropriation Act approved May 18, 1916 (39 Stat., 123), provision is made for issuance of patents in fee on allotted lands in various irrigation projects, viz: Blackfeet, Fort Peck, Flathead, Okanogan and Yakima. In all except the Flathead the act provides a lien charge of some kind, usually a construction charge, to be recited in the patents to be issued, but a dissimilarity in the wording of the provision in reference to the different projects raises a doubt as to the intent of the act, and I have the honor to request instructions as to whether all patents in fee for lands in the various projects on which unpaid construction charges are due shall recite a lien and what would be a suitable wording for such a lien.

The provision with reference to the Fork Peck reservation recites:

That nothing contained in said act of May 30, 1908, shall be construed to exempt the purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon from any charge for construction of the irrigation system incurred up to the time of such purchase, except such charges as shall have accrued and become due in accordance with the public notices herein provided for, and the purchaser of any Indian allotment to be irrigated by said systems purchased upon approval of the Secretary of the Interior before the charges against said allotment herein authorized shall have been paid shall pay all charges remaining unpaid at the time of such purchase, and in all patents or deeds for such purchased allotments, and also in all patents in fee to allottees, or their heirs, issued before payment shall have been made of all such charges herein authorized to be made against their allotments, there shall be expressed that there is reserved upon the lands therein described a lien for such charges.

That portion of the act relating to the Blackfeet Reservation contains a similar provision.

The provision relative to the Yakima Project recites that:

If any allottee shall receive patent in fee to his allotment before the amount so charged against him has been paid to the United States, then such amount remaining unpaid shall be and become a lien upon his allotment, and the fact of such lien shall be recited in such patent and may be enforced by the Secretary of the Interior by foreclosure as a mortgage, and should any Indian sell any part of his allotment with the approval of the Secretary of the Interior, the amount of any unpaid charges against the land sold shall be and becomes a first lien thereon.

The provision relative to the Okanogan Project recites that:

If any Indian shall sell his allotment or part thereof, or receive a patent in fee for the same, any amount of the charge made to secure reimbursement remaining unpaid at the time of such sale or issuance of patent shall be a lien on the land, and patents issued therefor shall recite the amount of such item.

It will thus be seen that the act so far as it relates to the Fort Peck and Blackfeet Reservations provides that a lien for the construction charges shall be recited in—

1. Patents in fee to purchasers;
2. Patents in fee to allottees;
3. Patents in fee to heirs of allottees.

On the Yakima Project only patents in fee to allottees and purchasers are mentioned, and in patents in fee to allottees the amount remaining unpaid becomes a lien on the allotment and the fact of the lien shall be recited in the patent, while in the case of a purchaser the amount of the unpaid charges against the land sold becomes a first lien thereon. No provision is made that such lien shall be recited in the patent, and instead of merely reciting that it becomes a lien, it provides that it becomes a first lien, which may be enforced by the Secretary of the Interior by foreclosure as a mortgage, and

the Secretary may in his discretion refuse delivery of water to such land. Is this, then, a lien different in character, and are patents to purchasers not to recite such lien? No mention is made of patents in fee to heirs. Are such patents to issue without reciting such lien?

On the Okanogan Project provision is made that the amount of the lien shall be recited in patents in fee to allottees and purchasers, but here again no provision is made for a lien in patents in fee to heirs. This provision appears to refer only to money which may be spent in the acquisitions of water rights for lands heretofore allotted and . . . "nothing herein contained shall be construed to authorize any lien or claims upon or against said allotted lands not herein specifically provided for." Is this a lien so different in its nature from the others that a different form of wording will be required, and are patents in fee to heirs to issue without such a recital?

In the matter of patents for allotments in the Flathead Project the act is silent on the matter of liens to be recited in such patents, nor do I find such authority in any legislation relating to those lands. However, in the matter of the partition of the allotment of Dorothy Bigjohn Plant, Flathead allottee 835 (G. L. O. 660322), the Department, on November 14, 1916, directed the issuance of a patent in fee to Michel Plant for the land set apart to him—

Said patent to contain a clause reserving a lien for the cost of construction of projected irrigation works in accordance with said Act of May 18, 1916.

And in the matter of the application of Clerency D. Cramer, Flathead allottee 179 (G. L. O. 668248), on December 26, 1916, the Department directed issuance of a patent in fee, "said patent to be subject to a lien for irrigation charges as provided in the Act of May 18, 1916 (Public No. 80)."

In the case of Annie Palin, Flathead allottee 643 (G. L. O. 659801), it was stated in the recommendation of the report of the Commissioner of Indian Affairs:

The report from the Project Manager of the Flathead Reservation shows that the land described in this application is at present non-irrigable but that it may eventually be served through Mission "H" lateral system from Mission Creek, for which there seems to be a sufficient supply of water.

Your directions to this office of November 13, 1916, were that the fee patent should show that it is issued subject to the provisions of the Act of May 18, 1916 (Public No. 80).

While the intent is not clearly indicated, it may be presumed that Congress did not intend that a different kind of lien should attach in the different instances or that the lien should be recited in fee patents to certain classes only on some projects, and to all classes on others.

It is believed that our present fee patent forms can be utilized in such cases by inserting a lien worded as shown on the accompanying form, 4-1060. Should you find this suitable please indicate your approval.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, January 26, 1917:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant, and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. The lands hereby conveyed are subject to a lien, prior and superior to all other liens, for the amount of costs and charges due to the United States for and on account of construction of the irrigation system or acquisition of water rights by which said lands have been or are to be reclaimed, as provided and prescribed by the act of Congress of May 18, 1916 (39 Stat., 123) and the lien so created is hereby expressly reserved.

**REGULATIONS GOVERNING APPLICATIONS FOR RESURVEYS
UNDER THE ACT OF MARCH 3, 1909.**

CIRCULAR.
[No. 520.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 13, 1917.

The following regulations are issued to govern applications for resurveys under the act of March 3, 1909 (35 Stat., 845), as amended by the joint resolution of June 25, 1910 (36 Stat., 884), authorizing the Secretary of the Interior to cause to be made such resurveys of the public lands as after full investigation he may deem essential to properly mark the boundaries of the public lands remaining undisposed of. They are prompted by a desire to conserve the funds now available for the execution of resurveys and to insure their expenditure in the manner most advantageous to the general public interest,

and further to eliminate petitions which possess no intrinsic merit, without prejudice to the legitimate demands for resurveys contemplated by the said act.

The application when perfected under the following requirements should be submitted to the United States surveyor general of the district in which the lands are situated, or in case the United States surveyor general's office for that district has been abolished the petition may be transmitted to the Commissioner of the General Land Office at Washington, D. C.

The regulations are as follows:

1. As a general rule, and in the absence of any particular governmental purpose to be subserved, no township is eligible for resurvey unless title to at least 50 per centum of the area of the lands embraced therein remains in the United States. For the purpose of determining the eligibility of a township under this rule, lands covered by approved selections, school sections, and entries upon which final certificates or patents have been issued are to be considered as alienated lands. Townships within the primary limits of railroad land grants are generally ineligible.

2. The applicants for the resurvey of any township are required to present satisfactory prima facie evidence of the necessity for such action, based either upon general obliteration of evidences of the original survey or upon conditions so grossly defective as to preclude the possibility of a reasonably certain identification of the subdivisions of the subsisting survey or a satisfactory local restoration thereof.

3. A majority of the settlers in each township are required to join in the application and in addition there must appear the indorsements of the entrymen and owners, including the State, whose holdings represent the major part of the area entered or patented, with a description opposite each name of the lands actually occupied, entered, or owned, and a statement as to whether the applicant is a settler, entryman, or owner thereof. Where an entryman or owner, including the State, has failed for any reason whatsoever to join in the application, evidence of service of notice upon him for at least 30 days in advance of the filing of the application is required in order that he may be afforded ample opportunity to make timely protest against the granting of such resurvey if in his opinion such action is undesirable.

4. Applications for the resurvey of each township must be supported by evidence in the form of an affidavit, preferably from the county or other competent surveyor, showing in detail that the evidences of the original survey have been obliterated to such an extent as to make it impracticable to apply the suggestions of the circular issued by this office for the necessary restoration of the lines and

corners in the proper identification of the legal subdivisions occupied by the present or prospective entrymen or that the original survey is so grossly defective as to preclude the possibility of identifying or restoring the boundaries of the sections.

5. In general, no resurvey will be undertaken unless the preliminary examination of the township develops evidence of existing settlement and agricultural possibilities sufficient to support the presumption that the unappropriated lands therein are such as to attract bona fide entrymen, thus eliminating townships which, although theoretically eligible, are of such a physical character that the resurvey thereof would serve no useful purpose.

If upon receipt of the application the necessity for the resurvey is made apparent and the township is shown to be eligible therefor, a United States surveyor will be assigned under appropriate instructions to make an actual field examination to verify the correctness of the applicants' allegations upon which the resurvey petition rests, and if the report of his investigation establishes the necessity for an official resurvey the matter will then be laid before the Secretary of the Interior with a request for authority to proceed with the actual field work.

GENERAL.

In the application of the terms of this act it is not intended that there shall be undertaken any work involving the mere reestablishment of lost or obliterated or misplaced corners in a limited area of a township, such work being within the province of the local surveyors, and the authority of the surveyor general's office will be limited to the giving of advice in accordance with the circular for the restoration of lost or obliterated corners. Employees of the Government are prohibited from participating in the resurvey of a township, the reestablishment of lost corners, or in the subdivision of sections for private parties, even if the expense is borne by the county or municipal authorities or by individuals. To permit any such procedure would bring the Government into controversy with parties who feel aggrieved at the conclusions reached and would make the Government a party to various suits involving lands in private ownership in which it was not a real party in interest by virtue of ownership in the lands affected, and would ultimately extend to such calls for assistance from owners of private lands in settling their disputes as could not be met without detriment to the purpose for which the appropriations under the control of this office are made.

The Government's real interest in the resurvey of the public lands is well stated in the said act of March 3, 1909, "to properly mark the boundaries of the public lands remaining undisposed of." Its

duty being thus defined, this office has consistently refrained from attempting to do more in the location of corners of privately owned lands in townships being resurveyed than to place such corners where the surrounding evidences of survey unquestionably point to one conclusion as to the proper place for the reestablishment of a lost corner and, if conflicts arise out of the undisputed location of such corners, to survey out the claims by metes and bounds, showing the resulting conflicts and leaving the adjudication of the question to the local courts having jurisdiction over the lands involved.

The duty of this office in making resurveys may therefore again be stated to be the proper marking of the boundaries of the public lands remaining undisposed of, and this only after full investigation as to the necessity therefor.

CLAY TALLEMAN, *Commissioner.*

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

[35 Stat., 845, chap. 271.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior may in his discretion cause to be made, as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided,* That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: *Provided further,* That not to exceed five per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby. Approved March 3, 1909.

[36 Stat., 884—Joint resolution No. 40.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "five per centum" in the last proviso of chapter two hundred and seventy-one of volume thirty-five of the United States Statutes at Large be changed to read "twenty per centum," so that the said chapter when so changed shall read as follows:

"That the Secretary of the Interior may, in his discretion, cause to be made, as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly

mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: *Provided further*, That not to exceed twenty per centum of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby." Approved June 25, 1910.

ALLEGED UNLAWFUL INCLOSURE OF PUBLIC LANDS IN NEW MEXICO.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 23, 1917.

CHIEF OF FIELD DIVISION,
Santa Fe, New Mexico.

SIR: From time to time during the past two years numerous complaints have been received by this office relative to the maintenance of drift fences and alleged unlawful inclosures of public lands in southeastern New Mexico. Extensive investigations have been made by special agents under your supervision, and reports have been submitted thereupon. The reports have gone into the situation extensively and comprehensively, and deal not only with the alleged unlawful inclosure situation, but also contain information relative to the method employed on behalf of the State of New Mexico in making the selection of public lands, showing how in certain instances large areas of government lands are incidentally controlled by those in possession of the selected lands; the disposition by the State of lands thus selected; the control of pasturage by the control of water; the conflicts among the cattle men and sheep growers and settlers; and the extent of the exercise of the police power of the State which, it is alleged, has been resorted to in such a manner as to maintain fences upon and control of pasturage on the public domain in certain cases.

This office is also in receipt of a report in which it was alleged that the following statement was made by the grand jury during the April, 1916, term of the U. S. District Court:

It has been brought to the attention of the Grand Jury that there has been considerable fencing of public lands throughout the State by private parties. This fencing is illegal, and done to the detriment of other parties, who are deprived of the use of these lands. We, the Grand Jury, recommend that this matter be investigated by the United States officials.

The special agents' reports heretofore referred to, together with the maps submitted therewith, show that in most cases the so-called drift fences are constructed in such a manner that they in reality constitute complete inclosures of public lands, and that extensive areas are thus inclosed in violation of the act of February 25, 1885 (23 Stat., 321).

There has been considerable delay on the part of this office in arriving at a conclusion relative to the proper course to be pursued by it in this matter. That delay has been due, however, to a desire to be thoroughly acquainted with the whole situation,—not only the alleged unlawful inclosure situation, but also the situation in regard to the control of public lands by other methods than the construction and maintenance of fences. In order that an intelligent understanding of the whole matter could be had, you were, on January 4, 1916, directed not to submit to the U. S. Attorney for prosecution the cases which were then under general investigation by you until this office had an opportunity to duly acquaint itself with all the facts relating to those cases, especially since it appeared from the reports that the parties charged with maintaining illegal fences had signified a willingness to remove the same if it should be ascertained that they were in violation of the law.

Many facts and arguments have been presented for and against the maintenance of the fences under consideration herein. Attempts have been made to show that the cattle industry in the State of New Mexico is of more importance than the crop raising industry; that the removal of the fences will tend to injure materially the cattle industry, for the reason that some of the fences are being maintained for the purpose of preventing the spread of cattle contagion or of shutting off lands which are boggy or upon which are poisonous weeds. Speaking generally, such fences, while probably technically illegal, may or may not be of such a character as to render it the duty of the Government to procure their removal; this depends on whether or not they constitute such inclosures as will operate to give certain persons or interests a monopoly or control of the use of public lands or impede free access to the public domain by persons who desire to establish settlements thereupon or to otherwise use it in compliance with law.

The act of February 25, 1885 (23 Stat., 321) prohibits the fencing of public lands by persons having no claim or color of title thereto. It also states that no person, by force, threats, intimidation, or by any fencing or inclosing, or by any other unlawful means, shall prevent or obstruct the peaceable entering upon or establishing a settlement or residence on any tract of public land subject to settlement under the public land laws.

Prior to the passage of the act, the Government, as an ordinary proprietor, could compel the removal of unlawful fences upon the

public domain, but it could not maintain criminal prosecutions. The conditions which led to the passage of the act were set forth in a report made by the Public Lands Committee of the United States Senate at the time that the bill was pending before that body, wherein it was stated:

The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority and in open and bold defiance of the rights of the government, large, and oftentimes foreign corporations deliberately inclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such inclosures are open to settlement, yet no settler with scarce the means for the necessities of life would presume to enter any such inclosure to seek a home.

It was evidently the spirit and intent of the act of 1885 that access to the public domain to those who desire to peaceably enter or establish a residence or settlement thereupon, shall not be obstructed by parties that have no claim or color of title to the lands. That access may be impeded in various ways. It does not necessarily follow that the lands must be completely surrounded by fences constructed wholly upon public lands. The obstruction may be effected by the construction of fences which tie to natural barriers, such as mountains and rivers; by the construction by different parties of fences which join and form an unlawful inclosure; by the construction of so-called drift fences extending for miles in length, which to all intent and purposes, make the public lands adjacent thereto practically worthless for settlement; or even by the construction of fences without gates, or with gates which the public are not permitted to use, wholly upon privately-owned lands, so as to incidentally inclose public lands. For an illustration, see *Camfield v. United States* (167 U. S., 518), which is the leading case upon the subject.

The policy of the Government with reference to the use of its unappropriated public lands has been substantially uniform and well understood since the establishment of the Republic. That policy has been clearly stated by the United States Supreme Court in the case of *Buford v. Houtz* (133 U. S., 320), in which it was stated:

We are of the opinion that there is an implied license, growing out of the custom of nearly one hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and uninclosed, and no act of government forbids this use.

Congress evidently did not intend by the passage of the unlawful inclosure act to prohibit altogether the pasturage of public lands, or to reverse the former practice of the Government in that particular. *Camfield v. United States, supra*, page 527.

In view of the fact that sufficient evidence has been procured to establish a *prima facie* showing that access by prospective settlers to large areas of public lands in the State of New Mexico has been impeded by fences which are still being maintained in violation of the act of February 25, 1885, *supra*, you are hereby directed to notify all persons reported to be maintaining fences upon public lands in that State, that all unlawful fences and inclosures must be abated and removed on or before April 15, 1917, and that if the law in that respect is being violated after that date, steps will immediately be taken, by judicial process, to effect summary removal of the illegal fences. You may give copies of this letter to the press of the State as a matter of news. In the event that the above order shall not be complied with on or before the above mentioned date, you will present the facts involving cases of alleged maintenance of illegal fences coming to your attention to the United States Attorney, for such action as he may deem necessary under the act. If, in the meantime, you shall be consulted by those having or maintaining fences on the public domain as to such fences and inclosures as are violative of the purpose and spirit of the law, you will lay the facts of such cases before the United States Attorney, and advise such parties in accordance with his instructions. You will also confer with the United States Attorney in cases where court action shall appear imperative, and, if necessary, prepare a map or maps for him, showing thereupon the fences which, in your opinion, cause unlawful inclosures, or obstruct access of prospective settlers, and those fences which have been constructed merely for the purpose of shutting off boggy or alkali lands, or lands upon which are poisonous weeds or quicksands, but which do not impede free access to public lands by prospective settlers and the general public. If the question as to whether or not the parties maintaining fences have a claim or color of title to the lands inclosed arises, and you are in doubt as to whether or not the act of February 25, 1885, *supra*, is being violated, the United States Attorney should be consulted, since the question, what constitutes a claim or color of title within the purview of the act, is one for judicial determination.

Many complaints have also been received relative to the manner in which selections have been made by the State of New Mexico and the incidental inclosing of large areas of public lands thereby. Protests have also been filed in this office against a number of such selections. Much space was given in the special agents' reports above referred to relative to these so-called "shoestring selections."

The Governor of New Mexico is authorized to select for specified purposes, by the provisions of the enabling act of June 20, 1910 (36 Stat., 565, section 11), public lands in that State which are

subject to selection. The law does not prescribe the form in which selections may be made, nor does it vest authority in the land department to designate the person to whom the selected lands shall be leased or sold by the State. Notwithstanding the fact that apparent hardship to other land claimants may be occasioned at times, it is not practicable to prevent a selection of such lands, subject thereto, which has been made, for special or prospective value to the State, because of favorable location, or otherwise for the benefit of particular objects or institutions. Furthermore, the State is entitled, under the act, to select such lands in such amounts and localities as it deems advisable, until its right to select shall have been exhausted; and it may lease such lands as it shall have obtained title to, in such manner as the laws of the State shall authorize.

Attention has been called to the fact that the State of New Mexico has obtained withdrawals of large areas of unsurveyed lands within its boundaries under the act of August 18, 1894 (28 Stat., 394), and that prior to the approval of selections made by the State within such withdrawn areas leases have been made in favor of large cattle companies.

The records of this office show that while the State of New Mexico was quite active in its applications for withdrawals during the years 1912, 1913 and 1914, during the year 1915 there were withdrawn but 48,000 acres, and that during the past year the withdrawn lands fall far short of that amount. The greater portion of the lands withdrawn during the most active years have been surveyed, and the plats, if they have not already been filed, will be filed within a short time, and the unselected lands will be thrown open to homestead entry. The State has in numerous cases confined its applications to relatively small areas. Yet its applications have resulted in surveys of whole townships being made, thus bringing about the opening of lands to entry in advance of settlement. It will probably not be necessary for the State to make many applications for withdrawal and survey of lands in the future, since its right of selection is being rapidly exhausted.

The mere application for survey and withdrawal made by the State under the act of August 18, 1894, *supra*, does not, of course, vest the State with title to the lands; therefore, parties claiming such lands under lease from the State have no title whatever to the lands and no authority to fence the same by virtue of such lease. It would probably be different, however, after the State files its selection to select the lands. It has been held by the Department of the Interior in the case of *Hall v. State of Oregon* (32 L. D., 565), that an indemnity school selection, or other selection made in accordance with an act of Congress, which is pend-

ing for final consideration and disposition by the Secretary of the Interior, has the same segregative effect as an original homestead entry made under the homestead or other public land laws.

Another question which has been considered by the special agents is that which pertains to the acquisition by private parties of lands surrounding public lands, thereby, without the construction of fences and with the assistance of the local inferior courts, which grant to them injunctions prohibiting others from trespassing on privately owned lands, obtaining exclusive control of such public lands. Similar situations have arisen in the past in other public land States, and the subject has been considered by the courts. See the cases of *Buford v. Houtz*, *supra*; *Mackay v. Uinta Development Company* (219 Fed., 116), and *Hill v. Winkler* (151 Pac., 1014). The last mentioned is a New Mexico case. The courts in these cases held that the owners of private lands were not entitled to injunctions prohibiting parties from crossing those lands for the purpose of going upon the public lands thus surrounded, and that such owners could not obtain damages for trespass if sheep were driven across said privately owned lands. Persons desiring to cross such lands for the purpose of gaining access to the public lands, are, according to the tenor of these decisions, at liberty to do so, and if they meet with interference they should apply to the local courts for protection. The interposition of action by the land department is not necessary, therefore, in such cases.

The statutes of New Mexico, sections 127 and 128, General Laws of 1897, which appear as sections 4628 and 4829, Code of 1915, require that stock raisers in that State who appropriate a range and raise stock upon the public domain or elsewhere, shall provide sufficient water for the maintenance of the cattle. The question has arisen whether or not persons may acquire exclusive control of the public domain by following the requirements of said statute and thus prevent others from sharing in the use of the same. This is a question which appears to properly fall within the exercise of the police power of the State. The question was considered in the case of *Hill v. Winkler*, *supra*. It is apparent from the opinion in that case that it was not the intention of the State to enact legislation which would conflict with the act of February 25, 1885, *supra*, and that the State courts will not tolerate abuse on the part of individuals who may attempt to use the local statutes as a cloak under which to violate the federal statute. Furthermore, the President is authorized by the act of June 25, 1910 (36 Stat., 847), to withdraw areas of public lands containing watering places, and to set the same aside for the use of the public. If, therefore, your attention is called to such areas upon the public domain, and, upon investigation, you consider

that withdrawals should be made, you should report such cases to this office.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

EASTERN OREGON LAND CO., SUCCESSOR TO DALLES MILITARY ROAD CO.

Decided January 24, 1917.

STATES AND TERRITORIES—THE DALLES MILITARY WAGON ROAD GRANT—DETERMINATION OF LIMITS AND AREA.

Under the provisions of the act of February 25, 1867 (14 Stat., 409), granting lands in aid of the construction of The Dalles Military Wagon Road, the road as actually constructed defines the limits of the grant.

VOGELSANG, *First Assistant Secretary:*

The above-entitled case involves the final adjustment of the grant made to the State of Oregon by the act of February 25, 1867 (14 Stat., 409). This act provided, as far as here material, as follows:

That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia river, by way of Camp Watson, Canon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Fort Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: * * *. *And provided further,* That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further,* That the grant hereby made shall not embrace any mineral lands of the United States.

* * *

Sec. 4. *And be it further enacted,* That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections as provided in section first of this act.

Sec. 5. *And be it further enacted,* That lands hereby granted to said State shall be disposed of only in the following manner, that is to say: when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from

time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States.

Sec. 6. *And be it further enacted*, That the United States surveyor-general for the district of Oregon, shall cause said lands so granted to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this act into effect.

By an act of the legislature of the State of Oregon, dated October 20, 1868 (Laws of Oregon, 1868, p. 1), the grant to the State of Oregon was conferred upon the Dalles Military Road Company, a corporation. This corporation appears to have constructed a road, and a map showing its definite location and construction was approved and certified by the Governor of Oregon, June 23, 1869. This map, with the Government's certificate, appears to have been filed in the General Land Office, either October 28, 1869, or November 1, 1869. At the time of the construction of the road and the approval of this map and its filing in the General Land Office, but seven townships near The Dalles had been surveyed, nearly all of the townships traversed by the road and within the primary and indemnity limits of the grant being at that time unsurveyed. From the map so filed a diagram was prepared some time in 1871 in the General Land Office, upon sectionized paper, projecting the line of road. This diagram was transmitted to the local officers December 14, 1871, with instructions that the lands shown thereon to be within the three-mile or place limits and the ten-mile or indemnity limits were withdrawn. The diagram of 1871 can not now be located in the records of the General Land Office, but it appears to have been reproduced upon the diagram known as the diagram of October 2, 1890. The diagram of October 2, 1890, has heretofore been the basis of the adjustment of the company's land, especially as between it and other parties desiring to acquire title from the United States. The Commissioner of the General Land Office, in a decision dated July 5, 1912, held that upon the basis of the diagram of October 2, 1890, the area of the grant was 556,532.67 acres; that 555,532.20 acres had already been patented. The Commissioner, in his decision, proposed to patent to the grantee certain lands of an area of 1299.46 acres, which he held would fully satisfy and close the grant. From this action the Eastern Oregon Land Company, claiming to be the successor in interest of the Dalles Military Road Company, has appealed to the Department.

Upon December 12, 1912, the Department called for a further report in the premises. The Commissioner replied May 23, 1913, and from this communication it appears that the original map filed by the grantee disclosed that the road was 330½ miles long. The diagram prepared in the General Land Office discloses a length of

but 291 12/16 miles. The townships traversed by the road and within the limits of this grant have now been surveyed and the Commissioner reported that, taking the actual location of the road as shown by such township plats, the area of the grant would be 591,608.75 acres, an excess over the area already patented to it of 36,066.55 acres.

It should be noted that the granting act of February 25, 1867, did not require the filing of any map of definite location. Section 5 required the Governor to certify to the Secretary of the Interior when ten continuous miles of the road had been completed, the act prohibiting the sale of the granted lands until such certificates of the Governor had been filed. The original purpose of filing the map approved by the Governor of Oregon appears to have been to show that the road had been constructed and its approximate location. The withdrawals then made by the land department were, no doubt, for the purpose of putting upon notice intending settlers and entrymen within the limits of the grant and to protect such grant from adverse appropriation.

The diagram, as prepared by the General Land Office and used heretofore in adjusting the company's grant, varies materially from the location of the road as it was actually constructed upon the ground. This has resulted in the company at times receiving patent for lands not actually within the grant according to the location of the road as actually constructed, and losing lands patented to third parties under the public land laws which were within the grant according to the road as actually constructed.

In the case of *Hardman v. The Dalles Military Wagon Road Company* (23 L. D., 94), it was held that as between a third party and the grantee the diagram herein referred to, which had stood unquestioned for a long term of years and under which rights had vested, would not be disturbed. In *Duncan et al. v. The Dalles Military Wagon Road Company* (22 L. D., 271), it was held that the actual terminus of the road as constructed should determine the terminal limits of the grant.

The matter as now presented is not one between the wagon road company and third parties, but primarily one between the grantor, the United States, and its grantee. Under the original act of February 25, 1867, I am of the opinion that the location of the road as actually constructed in conformity to the terms of the act, defines the limits of the grant. The road as projected upon the diagram of 1871, and reproduced in 1890, does not conform to such actual construction. Indeed, such diagram at times places the road not in harmony with the terms of the granting act, so that, if it absolutely controlled, it might be doubtful as to whether the grantee had complied with the terms of the grant. The road as actually constructed

and the original map filed by it, however, show a compliance with the terms of the grant. If the converse of the present proposition were presented to the Department, viz, that the diagram as prepared by the Commissioner of the General Land Office vested in the grantee a greater area than the road as actually constructed warranted, it would no doubt be the duty of this Department to decline to patent such an excess area. The alternative is also true, that is, the diagram disclosing a less area than the road as actually constructed warrants, can not control, and in the adjustment of the grant between the United States and the grantee, I am of the opinion that the actual location of the road as constructed is the basis of the adjustment and that the company is entitled to the area of the grant as fixed by that basis or as reported by the Commissioner, 591,608.75 acres.

As above indicated, the error in the projected diagram has resulted in the patenting to the Road Company of certain lands falling without the limits of the grant and of certain lands to other parties falling within the limits of the grant. The final adjustment should therefore be made, if possible, without disturbing prior titles which have vested by reason of the Department's previous actions under the diagram of October 2, 1890. In the appeal counsel for the appellant state:

We admit that you would probably not be justified in correcting this error if by so doing you disturbed titles in innocent third parties. We do not ask this. We merely ask that if you find our contention correct that we be allowed to select the area lost, because of the erroneous diagram, from vacant unappropriated public lands within, first, our place limits and then, if necessary, within our indemnity limits. This we submit is a fair, just way out of the difficulty, which will disturb no titles and injure no third parties.

The Department is of the opinion that the method suggested by the appellant is a fair and proper one for the final closing of the grant. The Commissioner will call upon the Dalles Military Road Company and its successor in interest, the Eastern Oregon Land Company, to file their acquiescence in the final adjustment of the grant upon the basis that the grantee select the present deficiency, to wit: 36,066.55 acres, first from vacant, unappropriated public lands within the place limits of the grant as ascertained by the location of the road as constructed upon the plats of township survey, and then from vacant, unappropriated public lands within the indemnity limits of the grant as so ascertained. Upon the filing of the grantee's acquiescence herein, such selections should be made as promptly as practicable and receive speedy adjudication by the Commissioner.

The decision of the Commissioner is accordingly reversed and the matter remanded for final adjustment of the grant along the lines herein indicated.

**SMALL HOLDING CLAIMS—RAILROAD GRANT—ACT OF APRIL
28, 1904 (33 Stat., 556).**

INSTRUCTIONS.

[No. 522.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 24, 1917.

REGISTERS AND RECEIVERS,

United States Land Offices in New Mexico.

SIRS: The Act of April 28, 1904 (33 Stat., 556) entitled, "An Act for the relief of small holding settlers within the limits of the grant to the Atlantic and Pacific Railroad Company in the Territory of New Mexico," provides:

That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

Sec. 2. That the Secretary of the Interior shall, as soon as may be after the passage of this Act, cause inquiry to be made of all lands so held by settlers, and shall cause the holdings of such settlers to be surveyed, and on receiving such relinquishments or deeds shall at once, without cost to the settlers, cause patents to issue to each such settler for his or her such holdings: *Provided*, That not to exceed one hundred and sixty acres shall be patented to any one person, and such recipient must possess the qualifications necessary to entitle him or her to enter such land under the homestead laws.

Sec. 3. That any fractions of any such sections of land remaining after the issuance of patents to the settlers as aforesaid shall be subject to entry by citizens the same as other public lands of the United States.

The purpose of this act is to enable certain claimants to lands, known as "small holding claimants," who were authorized to receive patents for such lands, not to exceed 160 acres, upon specified conditions, by sections 16 and 17 of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), to complete title to their entire claims, the odd numbered sections in a number of cases having passed under the grant by Congress to the Atlantic and Pacific Railroad Company; but it will be observed that the benefits intended to be conferred are restricted to the odd num-

bered sections within the limits of said railroad grant in what is now the State of New Mexico, and that the act is not mandatory, but simply provides a means for the relief of said claimants, depending upon the voluntary relinquishment by the railroad company, or its successors in interest and its or their assigns, upon request of the Secretary of the Interior, of the lands claimed.

Under the provisions of the act of March 3, 1891, as amended by the act of February 21, 1893, *supra*, and the act of February 25, 1909 (35 Stat., 655) a claim not filed with the Surveyor General of New Mexico before March 4, 1910, is invalid, and it does not appear to be the intention of the present law to revive any such claim, excepting so much thereof as may be found to be within an odd numbered section of sections granted to the Atlantic and Pacific Railroad Company.

Settlers on railroad lands in the State of New Mexico having claims subject to adjustment under the provisions of the act of April 28, 1904, should file in the proper local land offices proofs of their claims. The proof required of claimants under this act is that the land claimed has been occupied as a home or homestead by themselves, or by their predecessors in interest, as settlers, for a period of at least twenty-five years immediately preceding the passage of this act, and that the claimants possess the qualifications necessary to entitle them to enter lands under the homestead law. This proof may be made before your office or before any officer authorized to take homestead proofs, and may consist of the affidavit of the claimant, corroborated by at least two witnesses having knowledge of the facts; and in cases where the claimant was not himself a settler during the whole period of twenty-five years next before the passage of the act, but bases his claim partly upon the occupancy of prior settlers, the affidavits must give the names of such settlers, the periods covered by their respective settlements, and the material facts evidencing such settlements.

As the law provides that the lands to which the claimants may be found entitled shall be patented without cost to them, you will not require the payment of any fees or commissions, but publication of notice of intention to make proof will be made in accordance with the requirements of the circular of March 30, 1909 (37 L. D., 536). When the proof is filed in your office you will examine it and if found defective in any respect or insufficient to entitle the claimant to the tract applied for, you will reject it in the usual way or take other appropriate action; but if the proof is complete and in your judgment sufficient to entitle the claimant to the land, you will transmit it to this office without the issuance of a final certificate, together with your recommendation and a statement of the facts disclosed by your

records relative to the land involved. When the proof reaches this office it will be examined, and if upon its face it is found sufficient, the railroad company will be called upon for a statement as to whether it owns the land, and if so, whether it would be willing to reconvey in case the settlement claim be found sufficient under the law. If the company or its assigns decline to entertain the suggestion of reconveyance, in such event the settlement claim will be rejected. But if reply is made in the affirmative, then field examination will be directed, not only with reference to the facts alleged in the proof but also as to the quality of the land applied for and all of the land in any section thus affected. Should the field examination show the settlement claim to be invalid, charges will be lodged against the claim and the matter will proceed to final determination under the usual procedure. Should decision be favorable to the settlement claim upon report of the field examiner, or upon the hearing, as the case may be, the railroad company will then be requested to convey the land to the Government by proper deed or relinquishment with evidence of title, which instrument of conveyance should not be recorded until accepted by the Department. Should the deed or relinquishment be accepted, it will be returned to the company to be properly recorded on the records of the county in which the land involved is situated, after which it will be retransmitted for the files of this office. You will then be directed to issue final certificate upon the settlement claim as a basis for patent. The company may then file application for land of equal area and quality with that conveyed.

The authority given the railroad company to relinquish lands covered by the claims of the settlers and select other lands in lieu thereof, does not restrict it to the acreage embraced in such claims, but the company may relinquish any part, or the whole, of any section containing such claim or claims, and any fraction of any such section remaining after the issuance of patents to the settlers will be subject to entry the same as other public lands.

For any lands reconveyed by the company after April 28, 1916 (the date of the departmental order so directing), it will be required to select in lieu thereof an area in compact form approximating that relinquished. For example, if 160 acres be relinquished for the benefit of any one settlement claim, a selection in lieu thereof must be in compact form approximating that area; and if an entire section be relinquished because of a settlement claim or claims for a portion thereof, then in that case the lieu selection must be of a like area in compact form.

If it is found upon examination when it reaches this office that the company's application to make lieu selection is regular on its face, the field service will be directed to make an investigation in the field

with reference to the quality of the land selected, and also as to the quality of any of the base land not already examined as to its quality. When the report of the field examination has been received, further appropriate action will be taken on such selection.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

STATE OF UTAH.

Decided January 25, 1917.

APPLICATION FOR SURVEY BY STATE—NATIONAL FOREST—EFFECT OF APPLICATION.

The application of a State for the survey of lands under the act of August 18, 1894 (28 Stat., 394), will not prevent the inclusion of the lands within a national forest.

SALINE LANDS IN NATIONAL FORESTS.

Lands in national forests chiefly valuable on account of saline springs or saline deposits are subject to location and disposal under the mining laws only.

GRANT TO STATE OF UTAH—SALINE LANDS.

The fact that the State of Utah may, in satisfaction of its grant under section 8 of the enabling act of July 16, 1894 (28 Stat., 107-109), resort to saline as well as agricultural lands within the State, confers no right to select saline lands, so long as they remain in a National Forest.

VOGELSANG, First Assistant Secretary:

The State of Utah appealed from decision of January 18, 1913, by the Commissioner of the General Land Office, holding for cancellation its application to select the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 20, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 21, T. 12 S., R. 2 E., S. L. M., as saline lands under the provisions of Sec. 8 of the act of June 16, 1894 (28 Stat., 107).

Under date of February 14, 1916, the secretary of the State Land Board requested cancellation of the selection as to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, T. 12 S., R. 2 E., for the reason that the assignee had stated that he does not desire the selection as to said tract.

September 21, 1899, T. 12 S., R. 2 E., was withdrawn, upon the application of the State, for survey under the act of August 18, 1894 (28 Stat., 394), which act gives preference right of 60 days to a State within which to make application for the selection of lands so withdrawn. The township was surveyed in the field in August, 1901, and the survey plat was filed in the local office May 23, 1903. However, prior to the filing of the township plat the lands were embraced within a forest reservation by proclamation of August 3, 1901 (32 Stat., 1985). The selection was filed July 17, 1903.

September 5, 1903, the selection was considered by the Commissioner of the General Land Office, who at that time construed the grant to be for all of the saline lands in the State, and he held that the grant was not defeated by the said reservation. He required the State to furnish affirmative proof as to the saline character of the lands. However, a question afterwards arose as to the interpretation of the grant and further action on the case was suspended awaiting decision on the question by the Supreme Court of the United States. Such decision was rendered May 29, 1911, in the case of *Montello Salt Company v. State of Utah* (221 U. S., 452). In the light of that decision the Commissioner held the selection for cancellation as above stated.

The State contends that by its application for survey it acquired a preference right of selection which could not be defeated by the withdrawal for forest purposes. This question has been the subject of consideration in other cases and has been decided adversely to the contention of the State. In the case of *Heirs of Irwin v. State of Idaho et al.* (38 L. D., 219), it was held (syllabus):

No such preferential right of selection is secured by the application of a State for the survey of lands under the act of August 18, 1894, as will prevent the inclusion of the lands within a National Forest; and such application does not constitute a "filing" or "entry" within the meaning of the excepting clause in the proclamation of May 29, 1905, establishing the Sawtooth, now Boise, National Forest.

See also opinion of September 15, 1909, approved by the Attorney General, to the same effect. (38 L. D., 224.)

The grant under which the State is claiming is contained in Sec. 8 of the enabling act of July 16, 1894 (28 Stat., 107-109), which reads as follows:

That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the State of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portion of said lands that may not have been selected by said Territory may be selected by said State. *That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all the saline lands in said State, are hereby granted to said State, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely held and invested by said State, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.*

In the Supreme Court decision above mentioned, it was held as follows (syllabus):

The words "and including" following a description do not necessarily mean "in addition to," but may refer to a part of the thing described.

The words "110,000 acres of land * * * and including all the saline lands in the State" as used in section 8 of the Utah Enabling Act are not to be construed as a grant of such salines in addition to the 110,000 acres, but simply as conferring on the State the right, which it would not otherwise have, of including saline lands within its selections for the 110,000 acres.

This construction is in harmony with the uniform policy of Congress in connection with grants to the States of saline lands.

It is contended, however, that the right of the State to select saline lands to the extent of the grant can only be defeated by prior appropriation thereof under the mining laws in the manner appearing in the case cited and that a mere reservation for forest purposes including the land does not interfere with the right of the State to its selection.

The act of January 31, 1901 (31 Stat., 745), provides that lands containing salt springs, or deposits of salt in any form and chiefly valuable therefor, are subject to location and purchase under the provisions of law relating to placer mining claims, with the restriction that such purchaser may take only one such claim.

The act of June 4, 1897 (30 Stat., 35-36), contains the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. * * * Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations. * * * And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The State urges that in view of these provisions of law, saline lands cannot properly be placed in a forest reservation, and that inasmuch as they are open to other claims under the placer mining laws, the State should in such circumstances be permitted to take them under its grant; or that they should be eliminated from the reservation so that the grant may operate upon them.

In answer to these contentions it may be said that if these lands be in fact chiefly valuable on account of saline springs or saline deposits, they are only subject to location and disposal under the mining laws as specifically provided by the act cited. The forest withdrawal is equally effective to bar operation of the grant whether the application thereunder be for saline lands or for agricultural lands. The

grant was one of quantity, including saline lands. No particular tracts were granted. The entire grant might be satisfied by selection of agricultural lands or of saline lands. No preference right was given to select saline lands. So long as the reservation stands it prevents selection, and the lands may be taken, if at all, only under the mining laws.

The suggestion that the said tracts be eliminated was taken up with the Department of Agriculture, which has supervision over the national forests. That Department reported that these tracts were very important to the forest and that it could not be conceded that they are more valuable for their saline deposits than for forest purposes. Therefore, the suggestion for elimination of the lands from reservation could not be entertained.

No error is seen in the action below and therefore the decision appealed from is affirmed.

MINNESOTA DRAINAGE LAWS—AMENDMENT—ACT OF SEPTEMBER 5, 1916.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 26, 1917.

REGISTERS AND RECEIVERS,

Cass Lake, Crookston, and Duluth, Minn.

SIRS: Your attention is invited to the provisions of the act of September 5, 1916, Public No. 253, copy hereto attached, which amends Secs. 5 and 6 of the act of May 20, 1908 (35 Stat., 169), known as the Minnesota Drainage Laws. The act amends Sec. 5 of said drainage law by omitting the following sentence:

Any part of the purchase money arising from the sale of any lands in the manner and for the purposes provided in this act which shall be in excess of the payment herein required and of the total drainage charges assessed against such lands shall also be paid to the receiver before patent is issued.

In lieu thereof, there is now inserted the following sentence:

Any part of the purchase money arising from the sale of any lands in the manner and for the purposes provided in this Act which shall be in excess of the drainage charges then delinquent shall be paid to and used by the county in which such land is located for the purpose of maintenance, improving and extending such drainage works within the area benefited by the drainage project in which such land shall have been assessed for such drainage charge.

Sec. 6 of the act is amended by substituting the word "entered" for the word "unpatented" as the third word of said section. It further amends the next to the last sentence of the section with reference to the amounts to be paid by persons who desire to become subrogated to the rights of purchasers at a sale of the lands, by sub-

stituting in place of the following provision found in the original act—

First, the unpaid fees, commissions, and purchase price to which the United States may then be entitled; and second, the sum at which the land was sold at the sale for drainage charges, and in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount at which the land was sold at the sale for drainage charges, together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charge, if the land when sold was unentered.

the following:

First, the unpaid fees, commissions, and purchase price to which the United States may then be entitled; and, second, the sum due at the sale for drainage charges; and, in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount paid for drainage charges, together with the interest paid thereon.

The amendments relate to the disposition of the excess bid by purchasers at a sale of the lands by the county auditors. Under the law as originally enacted, the excess in the case of entered lands went to the entryman, but in the case of unentered lands, the excess or bonus, in accordance with the construction placed upon the law by the Department, went into the Treasury, to the credit of the United States, or the Chippewa Indians, as the case may be. Under the law as amended, the excess in the case of unentered lands is to be used by the county in which the land is located for the purpose of maintenance, improving and extending the drainage works as set forth in the amended law.

Both the original law and the amended law make a distinction between the drainage charges and the excess. The excess is in the nature of a bonus and under the amended law is not to be collected by you. It should be collected by the county auditor at the time of sale.

The instructions under the Minnesota Drainage Law found in 45 L. D., page 40, are accordingly amended with reference to paragraphs numbered 6, 11 and 12, to agree herewith. You will be governed accordingly in future entries under this law.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

STOCK-RAISING HOMESTEADS—ACT OF DECEMBER 29, 1916 (PUBLIC NO. 290)—INSTRUCTIONS, AS AMENDED MARCH 23, 1917.

[These instructions are included in General Land Office Circulars 523 and 538.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 27, 1917.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The following instructions are issued under the provisions of the act of Congress of December 29, 1916 (Public No. 290), relating to stock-raising homesteads.

WHAT LANDS SUBJECT TO ACT.

1. The Secretary of the Interior is authorized, pursuant to application or otherwise, to designate unreserved public lands in any of the public-land States, but not in Alaska, as "stock-raising lands." This includes ceded Indian lands, unless entries therefor are limited to a smaller area by the acts governing their appropriation; but it does not include lands in national forests. From time to time lists of land thus designated will be sent to the registers and receivers in the districts wherein the land is situated, and they will be advised of the dates when the designations become effective.

2. The lands to be designated are those the surface of which is, in the opinion of the Secretary of the Interior, chiefly valuable for grazing and raising forage crops, which do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that 640 acres are reasonably required to support a family. The classification will be made, so far as practicable, to exclude lands that are not chiefly valuable for grazing and raising forage crops, either because too valuable for such use or too poor for such use. Lands which are capable of producing valuable crops of grain or other food cereal or fruit are not subject to designation, being, if otherwise subject to entry, disposable under the 160-acre or 320-acre homestead law, according to their character. Lands of such arid or poor character that they are worthless or fit only for occasional grazing in connection with large areas of other land are not subject to designation and entry under this act. No tract may be designated which contains a water hole or other body of water, needed or used by the public for watering purposes, and such tract, and other tracts, required for access of the public thereto, may be reserved by the President and kept open to the public use under rules prescribed by the Secretary of the Interior. Whether the land will or will not support a family is not guaranteed in any manner by the designation of the land as subject to this act. The homesteader himself must take the burden of accepting the land designated as of a character that meets the requirements of the law.

FEES AND COMMISSIONS.

3. The fee and commissions on all entries under this act are calculated on the same basis as other entries. For a tract of less than 81 acres, the fee is \$5, and for that area or more, it is \$10. The

commissions, both on making the entry and on submitting final proof, amount to 3 per cent on the Government price (\$1.25 or \$2.50 per acre, as the case may be) of the land, in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, and to 2 per cent in the other States. For example, on an entry for 640 acres in Washington, not within granted railroad limits, and therefore \$1.25 land, the payment on making entry would be \$34, and on submitting proof would be \$24, in addition to testimony fees and publication fees payable to a newspaper.

QUALIFICATIONS FOR ENTRYMEN.

4. (a) Any person qualified under the general laws to make homestead entry (that is, who has not exercised his right, or who is entitled to restoration of his right under general provisions of law) may make a stock-raising homestead entry for not exceeding 640 acres of unappropriated, surveyed land, in reasonably compact form, which has been designated by the Secretary as above indicated. No rights can be acquired by an application for unsurveyed land; but where a tract of unsurveyed land has been designated a settlement right on not more than 640 acres may be established and maintained if the boundaries are plainly marked on the ground.

(b) A person who has perfected, or has pending, an entry or entries initiated since August 30, 1890, under the desert-land, timber-and-stone, or preemption laws for 320 acres in the aggregate is disqualified from making any kind of entry under this act. If he made entries under said laws for not more than 160 acres they do not affect his right under this act. If he has entered under the desert-land, timber-and-stone, or preemption laws more than 160 acres but approximately 40 acres less than 320 acres, he is entitled to make an original or an additional entry under this act; but the tract entered hereunder (which in no case must exceed approximately 640 acres), together with the land entered under the other laws mentioned, and his prior uncanceled homestead entry or entries, if any, must not aggregate more than 800 acres. In other words, a person who was qualified to make an original or an additional homestead entry under other laws for as much as approximately 40 acres can enter hereunder such an amount of land as will, with the area theretofore entered under the homestead laws, not exceed 640 acres, but the total of all entries under the agricultural public-land laws (i. e., timber and stone, desert land, preemption, and homestead) must not exceed 800 acres.

COMPACTNESS OF ENTRY.

5. With respect to compactness, no entry, nor any claim comprising an original entry and an additional entry under this act, shall entirely surround an unappropriated tract of public land, nor shall it have an extreme length of more than 2 miles if there be available land of the character described in the act the inclusion of which in the claim would reduce such length. An entry may not include two separate tracts, even though they corner on each other, unless each adjoins an original entry, as herein explained, except where entry is made under the proviso to section 3 of the act, and the homesteader is able to secure land adjoining his former entry for only part of the area he is entitled to take.

ADDITIONAL ENTRIES WITHIN 20 MILES.

6. Any person, otherwise qualified, who has made a homestead entry for less than 640 acres of land which shall be designated as stock-raising land, and who has completed the term of residence required or will have completed it within six months, is entitled, under the first proviso to section 3 of the act, to make an additional entry for a tract of designated land within a radius of 20 miles from the tract originally entered, and making up therewith an area of not more than 640 acres. Such entries may include two incontiguous tracts if one of the tracts is contiguous to the original entry. But such applicant can not be allowed to secure a tract incontiguous to his first entry unless he enters all available land contiguous thereto. If he applies for land which is incontiguous to the original entry, he must furnish an affidavit that there is no unappropriated, unreserved land contiguous thereto, of the character described in the act, other than that for which he applies. The same limitation as to compactness of form will be enforced as with respect to original entries. It is immaterial whether a person applying for additional entry under this provision of the law resides upon or owns the land first entered.

A married woman may not make an additional entry under this section unless her situation is such that she is qualified to make an original homestead entry; and no person can make such additional entry as widow or heir of the original homesteader.

If a person has made two former homestead entries (his right not having been restored as to either by a second entry act) and not more than six months' further residence is required as to either, he may make an additional entry under this section, provided all the other lands involved lie within 20 miles of the tract first entered.

If the two tracts formerly entered are within 20 miles of each other, proof has been submitted on the original entry, and there is available land contiguous to the tract covered thereby, the person may make an additional entry therefor under section 5 of the act, provided he still owns the original tract and resides thereon—although more than six months' residence be still required in connection with his first additional entry. See paragraph 9 as to the method of perfecting title to an entry under section 5.

If residence for more than six months be required on said first additional entry, claimant is not qualified to make any entry under the stock-raising act for land incontiguous to the original, even though it be contiguous to the additional tract. Under the circumstances last referred to said additional entry may, pursuant to the homesteader's application, be amended by including such contiguous land, its character being changed so as to stand under the stock-raising homestead law. However, such amendment can not be allowed if there is sufficient unappropriated stock-raising land adjoining the original entry to make with the other tracts 640 acres. That area is the utmost which the homesteader may in any manner acquire through the entries referred to.

If the tracts covered by a person's two former entries are more than 20 miles apart, he is not qualified to make an additional entry under any section of the stock-raising homestead act.

PROOFS ON ABOVE ENTRIES.

7. The entries hereinbefore explained may be perfected by proofs submitted within five years after their dates, on a showing of compliance with the provisions of the three-year law (act of June 6, 1912—37 Stat., 123), except that expenditures for improvements must be shown in lieu of the cultivation required by that act. The entryman must show that he has actually used the land for raising stock and forage crops for not less than three years, and that he has made permanent improvements upon the land, having an aggregate value of not less than \$1.25 per acre, and tending to increase the value of the land for stock-raising purposes; and at least one-half of the improvements must be placed upon the tract within three years after the date of the entry.

As to residence, this must be continued for three years, subject to the privilege of a five months' absence in each year, divisible into two periods, if desired; but credit on the residence period on account of military service during time of war will be allowed as on other homestead entries. It must appear at the time of proof that there is then a habitable house on the land; but it will not be counted in estimating the value of the permanent improvements required to be placed on the tract, as above stated. If the entry comprises two noncontiguous tracts, the residence may be on either.

ADDITIONAL ENTRIES FOR CONTIGUOUS TRACTS BEFORE PROOF.

8. Under section 4 of the act, any person having a homestead entry for land which shall have been designated under this act, upon which he has not submitted final proof, may make entry of contiguous designated lands, which, with the area of his original entry, shall not exceed 640 acres. On submission of proof on such additional entry, he must show residence on either tract to the extent ordinarily required, but will be entitled to credit for residence on the original tract before or after the date of the additional entry; he must also show improvements on the additional tract to the value of \$1.25 for each acre thereof. Proof on the additional entry may be submitted within five years after its allowance, when the requisite residence can be shown, but not before submission of proof on the original entry. Proof on the original entry must be submitted under the provisions of the law pursuant to which it was made and within its life, as limited thereby; but, subject to that condition, one proof may be submitted on the two entries jointly.

The marriage of a woman does not disqualify her from making an additional entry under this section; and husband and wife may make entries thereunder, additional to their respective pending entries, if an election as to residence on one of the original tracts, as provided by the act of April 6, 1914 (38 Stat., 312), has been accepted.

Such additional entry may be made by the widow or heirs of the original homesteader if they have continued to reside upon the original tract.

ADDITIONAL ENTRIES FOR CONTIGUOUS TRACTS AFTER PROOF.

9. Under section 5 of the act any person who has submitted final proof on an entry under the homestead laws for land designated under this act, who owns and resides upon said land, may enter land

so designated contiguous thereto, which, with the area of his original entry, shall not exceed 640 acres; and in order to acquire title thereto it is necessary only that he show the expenditure on the additional entry of \$1.25 per acre for improvements of the kind above described. At least half of such expenditures must be made within three years after allowance of the entry. Proof may be submitted at any time within five years after the entry is allowed.

Where satisfactory proof has been submitted on the original entry, the additional entry for contiguous land may be perfected under this section of the act regardless of the question whether it was three-year, five-year, or commutation proof.

The widow or heirs of the original homesteader may make an additional entry under section 5, if they have continued to reside upon the original tract.

ENTRIES IN LIEU OF RELINQUISHED LANDS.

10. (a) Under section 6 of the act, a person, otherwise qualified to make homestead entry, who has a perfected or an unperfected homestead entry for less than 640 acres of land which shall have been designated under this act, on which he resides and which he has not sold, and who is unable to make a full additional entry under the provisions of section 3 thereof, for the reason that there is not sufficient available land within the 20-mile limit to afford him the area to which he is otherwise entitled (as above indicated), may make an entry for the full area of 640 acres within the same land district, provided he shall relinquish the original entry, if not perfected, or reconvey the land to the United States, if final certificate has issued therefor.

(b) If proof has not been submitted on the original entry he must, with his relinquishment, furnish his affidavit, corroborated, so far as possible, by two witnesses, showing that at the time of filing application under this act he resides upon the land covered by said entry, that he has not sold, transferred, or conveyed the land or any interest therein, or made a contract or agreement so to do, and that there is not, within twenty miles of the land embraced in his original entry, a tract of land of the character described in this act, of area sufficient to make up, with such original entry, the area he is entitled to enter.

(c) If final certificate has issued on the first entry, it must be shown by a certificate from the proper recording officer of the county in which the land is situated, or by satisfactory abstract of title, that the applicant has not transferred any interest in the land sought to be reconveyed and that there are no liens, unpaid taxes, or other incumbrances charged against it. Moreover, reconveyance of the land must be made by deed executed by the entryman, and also by his wife if he be married, in accordance with the laws governing the execution of deeds for the conveyance of real estate in the State in which the land is situated. The deed of reconveyance should accompany the application, but should not be recorded until directed by this office. On acceptance of an application of this character, the deed will be returned for recording and refiling in your office before the entry is allowed.

(d) Where proof has been submitted, but final certificate has not issued, the relinquishment must be accompanied by an abstract of title or certificate of recording officer, as above specified.

(e) Where the former entry for land already designated under this act has not been perfected and is relinquished, you will allow the application for entry under this act, if no other objection appears. Where final certificate has issued on the former entry you will promptly forward the application and accompanying papers for consideration by this office.

(f) The land relinquished or reconveyed will not become subject to other appropriation until the new entry is allowed, and if an order for allowance thereof be made by this office, its receipt in the local office will operate to restore to the public domain the tract originally entered.

(g) An application under this provision of the law may be accompanied by petition for designation under the act of the land sought and of the tract covered by the former entry, as hereinafter explained.

(h) Proof on an entry allowed under this section is governed by the same rules as though it were an original entry under this act.

(i) The fact that an applicant owns more than 160 acres of land, acquired otherwise than through homestead entry, does not exclude him from the privileges granted by this section.

PETITIONS FOR DESIGNATION.

11. (a) The proviso to section 2 of the act confers a preference right of entry upon a person pursuant to whose petition land has been designated. Any person qualified to make an original or an additional entry under this act may file an application to enter a compact body of unappropriated, unreserved, surveyed public land of the character described, which has not already been designated under this act, accompanied by petition in duplicate for the designation of such land and of the tract included in any former entry.

(b) He must, when he files said application, pay the regular fee and commissions; and, if the tract is ceded Indian land, he must at that time pay that part of its price ordinarily required when entry is made. The entire amount paid will be carried in the "Unearned money" account, and will be repaid by the receiver if the application be not allowed.

(c) All petitions for the designation of lands presented on behalf of individual applicants should be filed in the local land office. Individual petitions for designation will not be considered unless they are filed in connection with applications to make entry under the act.

12. (a) The petition must be in the form of an affidavit, executed in duplicate, and corroborated by at least two witnesses who are familiar with the character of the land. For convenience in filing it is desired that petitions be prepared on sheets not over 8½ by 11 inches in size with margins of an inch on the top and the left-hand side. The petition must contain the name and the post-office address of the applicant, a description by legal subdivisions of all the lands involved properly listed by entries with the serial number of each former entry. If the application contemplates the making of an original entry under this act or if the application relates to a contiguous original and additional entry, only one petition need be filed. If, however, the lands which it is desired to have designated are comprised in two noncontiguous tracts, an additional copy of petition should be filed for each such tract.

(b) The petition should set forth in detail the character of each legal subdivision included in an application to make entry under this act and in any former homestead entries made under other acts. The information called for may be shown by means of a map or diagram whenever the facts can be advantageously presented thereby. Photographs of the land, where available, are useful in indicating its character and topography and, when presented, should be located with reference to the land lines and to the direction in which they were taken. The location of corners of the public surveys by which the applicant has determined the situation or legal description of the land should be indicated on the map or stated in the petition. It is believed that the requirements of these regulations as to furnishing a description of the land can properly be met only by a careful examination of the lands by the applicant, preferably assisted by a competent surveyor. Petitions which are deficient will be returned to the applicant for correction or he may be required to furnish supplemental affidavits concerning matters not discussed or which have not been described in sufficient detail. Care should be exercised in the preparation of petitions, as inaccuracies and omissions will tend to retard action, while false or misleading statements may lead to the rejection of the application.

(c) In the preparation of petitions attention should be given to the following considerations:

Surface water supply.—The relation of the lands to surface streams or springs rising on or flowing across or along them should be indicated, and the location of such water supplies should be accurately described with relation to the lines of the public surveys. If there is no surface water on the land, the location of such near-by sources of water supply upon which the applicant relies or which he proposes to use for stock-watering purposes should be described.

Underground water supply.—The location of any well or wells which may be present on the land should be described and information furnished in each instance concerning the depth of well, present depth to water, and yield. If there are no wells on the land, information should be furnished concerning any wells in the vicinity which may afford an indication of the probable depth to water on the lands applied for.

Irrigability.—If any part or parts of the land are irrigated, the location and source of water supply of such areas should be stated and the area irrigated in each legal subdivision indicated. If any portion of the land is under constructed or proposed irrigation ditches or canals, is crossed thereby, or is adjacent thereto, the relation of the lands to such water conduits and the possibility of their irrigation therefrom should be explained. If the lands are situated near or are crossed by streams which might afford a water supply for their irrigation, full particulars should be given as to the quantity of water available for this purpose and as to whether or not it can be applied to the lands. If artesian wells exist on or near the land or underground water is found under any part of the land at depths of less than 50 feet, the practicability of irrigating the land from underground sources should be fully discussed.

If the applicant has filed a notice of water appropriation or has acquired a right to use water for domestic, stock-watering, or irrigation purposes on the lands under the State law, a copy of such

notice of water appropriation or water right should be furnished. Any attempts to irrigate and reclaim the land under the provisions of the desert-land act should be described and the reasons for lack of success stated.

Timber and vegetation.—The character of the surface of the land in both the original and the additional entry as it is at the time of application under this act and of the tree and plant growth thereon should be described and the approximate area in each legal subdivision which is of such character that it is included in each of the following general classes should be shown: Lands containing merchantable timber; lands containing timber which is not merchantable; lands covered with mesquite or similar growth; lands covered with sagebrush; open grass lands; lands covered with greasewood and allied plants; rocky wastes; alkali flats; sand dunes; lands in agricultural crops or under cultivation. If none of the above terms are applicable to any portion of the land, details of its character should be furnished. Where timber occurs an estimate of the amount of such timber on each legal subdivision should be made.

Agricultural value.—The acreage in each legal subdivision which is capable of producing agricultural or forage crops by cultivation should be stated by the applicant, as well as the number of acres which have actually been cultivated. If the applicant or his predecessors in interest have made agricultural use of the land in his original entry, the area planted, the kind of crops raised, the yield, and the value should be stated for the last five seasons, or such part thereof as the land may have been under cultivation.

Grazing value.—The applicant should indicate the grazing character of all the lands involved by describing them as winter, summer, spring, fall, or permanent range. If the land or any part thereof has been used for grazing, the nature and extent of such use should be stated. The applicant should also furnish an estimate of the number of head of cattle or other live stock which, in his opinion, can be maintained on the land throughout the year.

(d) The applications for entry, if otherwise allowable and accompanied by petitions for designation which are in all respects regular, will be suspended by you and retained in your office, but you will promptly forward both copies of the petition by special letter to this office, which will transmit one to the United States Geological Survey for consideration. Where defects appear in the petitions—especially (as to additional entries) failure to refer in the petition to the tract originally entered—you will call for supplemental evidence, as in other cases; if this is not furnished, you will forward all the papers to this office for consideration, making proper recommendations in connection therewith. If there are defects in an application, aside from the accompanying petition, you will take action in the same manner as with other defective applications for entry.

(e) No other entry of the land will be allowed before the application has been finally disposed of. However, later applications therefor should be received and suspended. If withdrawal of an application under this act be filed you will promptly notify this office thereof, inviting special attention to the pendency of the petition for designation, and will close the case on your records. Prior to final action on the application the applicant's homestead right will be in

abeyance, and he will not be entitled to exercise same elsewhere, nor will he be permitted to have two applications under this act pending at the same time.

When designation of all the land involved has become effective you will allow the entry, unless the records show that there is possibility of a claim of preferential right for some part of the land under section 8 of the act, in which case the application will remain suspended until the expiration of the preferential right.

(f) If the Geological Survey advises this office that it is unable to classify the land, or some part thereof, as subject to designation, this office will, through the proper local land office, furnish the applicant with a copy of the Survey's report and will allow him 30 days within which to file response. At the applicant's option, he may either appeal from the finding to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the facts, accompanied by such evidence as is desired, tending to disprove the adverse conclusion reached by the Survey.

Such appeal or showing, if filed, will be forwarded by you to this office, whence it will be transmitted to the Geological Survey for further consideration. That bureau will consider the evidence submitted, and if it warrants such action will recommend designation of the land, or if its conclusion be still adverse will transmit the record to the Secretary with report. The case will thereafter be considered as having the status of an appeal pending before the Secretary's office.

In cases where the applicant fails to furnish a showing or to appeal from the order of this office requiring him to furnish it within the 30 days prescribed, or where the Secretary refuses designation, final action will be taken and the case closed by this office on the basis of the designations which may have been theretofore made.

(g) It is expressly provided by the act that the filing of an application for entry of land thereunder, though accompanied by petition for its designation, confers upon the applicant no right to occupy the land sought. No settlement or improvements should therefore be made until after designation of the land.

PREFERENTIAL RIGHTS FOR ADJOINING LAND.

13. (a) Under section 8 of the act any person who, as the holder of a homestead entry or as patentee thereunder, is entitled to make additional entry under this act has a preferential right to enter lands lying contiguous to his original tract and designated as subject to the act, said right extending for a period of 90 days after the designation takes effect. This right is superior to the right of entry accorded a person who had filed application for entry of the land under this act accompanied by petition for its designation. However, before a designation has been made the land is subject to settlement and entry under any other laws applicable thereto unless there are pending such application and petition.

(b) After the designation of land takes effect no application therefor will be allowed under this act or under any other law until 90 days shall have elapsed if the records show that it may conflict with a preferential right to be claimed on account of an entry for

adjoining land. Otherwise an application under this act may be allowed immediately on the taking effect of the designation.

Where there is conflict between an application for a tract by a holder of adjoining land, claiming a preferential right, and an application by one asserting no such right, you will allow the former and reject the latter, subject to the usual right of appeal. Where there is conflict between the applications of two or more persons claiming such preferential right of entry you will, after the expiration of the 90-day period, forward all the papers to this office for consideration, making on your schedules the necessary notations as to the method of transmittal. This office will thereupon make an equitable division of the different subdivisions among the applicants, so as to equalize as nearly as possible the areas which the different applicants will have acquired by adding the tracts thus allotted to those originally held or owned by them. An appeal will be allowed from the action of this office.

(c) Where there is but one subdivision adjoining the lands of two or more entrymen or patentees, entitled to exercise preferential right of entry, and seeking to assert same, said subdivision will be awarded to that person who first files application therefor with an assertion of such right.

(d) Where, on the date the designation of the land in question takes effect, the land originally entered by the possible claimant of a preferential right has not been designated under the act, the 90-day period accorded him will nevertheless begin to run from that date; but the entryman, in order to save his rights, must, within such 90-day period, file an application for the land claimed, accompanied by petition for designation of the original tract.

(e) A settlement right under any other applicable law, if initiated prior to designation or application and petition, will, if asserted in time, defeat a claim of preference right hereunder.

(f) The preference right of entry accorded to contestants by the act of May 14, 1880 (21 Stat., 140), is in no way affected by any of the provisions of this act.

(g) The fact that a person presents, with his application for entry under this act, the relinquishment of a former entry covering the tract sought confers upon him no preference right for entry of the land, and such application is subject to the preferential right given by section 8 of the stock-raising homestead law.

DISPOSAL OF COAL AND OTHER MINERAL DEPOSITS.

14. (a) Section 9 of the act provides that all entries made and patents issued under its provisions shall contain a reservation to the United States of all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same; also that the coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Said section 9 also provides that any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have

the right at all times to enter upon the lands entered or patented under the act, for the purpose of prospecting for the coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting.

It is further provided in said section 9 that any person *who has acquired from the United States the coal or other mineral deposits in any such land* or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the

ERRATUM.

At page 635, line 15, the word "agreement" should be succeeded by a semicolon and the following: "or, third, in lieu of either of the foregoing provisions, upon the execution "

printed in the appendix hereto, must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved, as directed in said section 9, as principal, with two competent individual sureties, or a bonding company which has complied with the requirements of the act of August 13, 1894 (28 Stat., 279), as amended by the act of March 23, 1910 (36 Stat., 241), and must be in the sum of not less than \$1,000. Qualified corporate sureties are preferred and may be accepted as sole surety. Except in the case of a bond given by a qualified corporate surety there must be filed therewith affidavits of justification by the sureties and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a United States postmaster as to the identity, signatures, and financial competency of the sureties. Said bond, with accompanying papers, must be filed with the register and receiver of the local land office of the district wherein the land is situate, and there must also be filed with such bond evidence of service of a copy of the bond upon the homestead entryman or owner of the land.

If at the expiration of 30 days after receipt of the aforesaid copy of the bond by the entryman or owner of the land no objections are made by such entryman or owner of the land and filed with the register and receiver against the approval of the bond by them, they may, if all else be regular, approve said bond. If, however, after receipt by the homestead entryman or owner of the lands of copy of the bond, such homestead entryman or owner of the land timely objects to the approval of the bond by said local officers, they will immediately give consideration to said bond, accompanying papers, and objections filed as aforesaid to the approval of the bond, and if, in consequence of such consideration by them, they shall find and conclude that the proffered bond ought not to be by them approved, they will render decision accordingly and give due notice thereof to the person proffering the bond, at the same time

the right at all times to enter upon the lands entered or patented under the act, for the purpose of prospecting for the coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting.

It is further provided in said section 9 that any person *who has acquired from the United States the coal or other mineral deposits in any such land* or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; or, second, upon payment of the damages to crops or other tangible improvements to the owner thereof under agreement of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon. This bond, the form whereof will be found printed in the appendix hereto, must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved, as directed in said section 9, as principal, with two competent individual sureties, or a bonding company which has complied with the requirements of the act of August 13, 1894 (28 Stat., 279), as amended by the act of March 23, 1910 (36 Stat., 241), and must be in the sum of not less than \$1,000. Qualified corporate sureties are preferred and may be accepted as sole surety. Except in the case of a bond given by a qualified corporate surety there must be filed therewith affidavits of justification by the sureties and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a United States postmaster as to the identity, signatures, and financial competency of the sureties. Said bond, with accompanying papers, must be filed with the register and receiver of the local land office of the district wherein the land is situate, and there must also be filed with such bond evidence of service of a copy of the bond upon the homestead entryman or owner of the land.

If at the expiration of 30 days after receipt of the aforesaid copy of the bond by the entryman or owner of the land no objections are made by such entryman or owner of the land and filed with the register and receiver against the approval of the bond by them, they may, if all else be regular, approve said bond. If, however, after receipt by the homestead entryman or owner of the lands of copy of the bond, such homestead entryman or owner of the land timely objects to the approval of the bond by said local officers, they will immediately give consideration to said bond, accompanying papers, and objections filed as aforesaid to the approval of the bond, and if, in consequence of such consideration by them, they shall find and conclude that the proffered bond ought not to be by them approved, they will render decision accordingly and give due notice thereof to the person proffering the bond, at the same time

advising such person of his right of appeal to the Commissioner of the General Land Office from their action in disapproving the bond so filed and proffered. If, however, said local officers, after full and complete examination and consideration of all the papers filed, are of the opinion that the proffered bond is a good and sufficient one and that the objections interposed as provided herein against the approval thereof by them do not set forth sufficient reasons to justify them in refusing to approve said proffered bond, they will, in writing, duly notify the homestead entryman or owner of the land of their decision in this regard and allow such homestead entryman or owner of the land 30 days in which to appeal to the Commissioner of the General Land Office. If appeal from the adverse decision of the register and receiver be not timely filed by the person proffering the bond, the local officers will indorse upon the bond "disapproved" and other appropriate notations, and close the case. If, on the other hand, the homestead entryman or owner of the lands fails to timely appeal from the decision of the register and receiver adverse to the contentions of said homestead entryman or owner of the lands, said register and receiver may, if all else be regular, approve the bond.

Mineral applications and coal-declaratory statements for and applications to purchase the coal or other mineral deposits in lands entered or patented under the act, reserved as provided in the act, will, if all else be regular, be received and filed at any time after the homestead entry has been received and allowed of record: *Provided*, That the lands or the coal or other mineral deposits therein are not at the time withdrawn or reserved from disposition.

(b) Every application to make homestead entry under this act must contain a statement to the effect that the entry is made subject to a reservation to the United States of all the coal and other minerals in the land, together with the right to prospect for, mine, and remove the same. (See Forms 4-016 and 4-016a, Appendix.) The face of final certificates issued on every homestead entry made under the provisions of this act must bear the following:

Patent to contain reservation of coal and other minerals, and conditions and limitations as provided by act of December 29, 1916 (Public, 290).

There will be incorporated in patents issued on homestead entries under this act the following:

Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove all the coal and other minerals from the same upon compliance with the conditions, and subject to the provisions and limitations, of the act of December 29, 1916 (Public, 290).

Mineral applications and coal-declaratory statements, applications to purchase, certificates and patents issued subject to the provisions of this act for the reserved deposits will describe the coal or other mineral according to legal subdivisions or by official mineral survey, as the case may be, and payment will be made at the price fixed for the whole acreage.

Mineral applications and coal-declaratory statements and applications under the coal and mining laws for the reserved deposits disposable under the act must bear on the face of the same, before

being signed by the declarant or applicant and presented to you, the following notation:

Patent shall contain appropriate notations declaring same subject to the provisions of the act of December 29, 1916 (Public, 290), with reference to disposition, occupancy, and use of the land as permitted to an entryman under said act.

Like notation will be made by the register and receiver on final certificates issued by them for the reserved mineral deposits disposable under and subject to the provisions of this act.

DRIVEWAYS FOR STOCK.

15. The reservation of driveways for stock, provided for in section 10 of the act, will be considered on application of parties interested, on recommendation of other departments of the Government, or on the reports of agents of this department. Lands withdrawn for driveways for stock or in connection with water holes can not thereafter be entered, and all applications to make entry for land so withdrawn, whether filed before or after the withdrawal, will be rejected.

MISCELLANEOUS PROVISIONS.

16. No credit will be given for any expenditure for improvements made prior to the designation of the land under this act.

17. Proofs on entries under this act must be submitted within five years after the dates of their allowance, and no such entry is subject to commutation.

18. Every person applying for entry under this act who has heretofore made an entry or entries under the homestead laws must furnish a description thereof or such data as will enable this office to identify it or them.

19. A person who is qualified to make an entry under section 4 or section 5 of the act for a tract contiguous to his original entry may waive said right and make entry under the provisos to section 3 if he shows that there is not sufficient available land adjoining his first entry to afford him the area which he is entitled to enter.

20. A person who has made entry under section 6 of one of the enlarged homestead acts may make an additional entry under the provisos to section 3 or under section 4 or 5 of this act, provided all be designated as stock-raising land; but he must reside on the land entered under this act or on that originally entered, if contiguous thereto, to the extent required by the three-year homestead act.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:

FRANKLIN K. LANE,

Secretary.

FORM OF APPLICATION FOR ORIGINAL ENTRY.

4-016.

[Form approved by the Secretary of the Interior Jan. 18, 1917.]

DEPARTMENT OF THE INTERIOR.

STOCK-RAISING HOMESTEAD ENTRY—ORIGINAL.

[Act of Dec. 29, 1916.]

United States Land Office _____

Serial No. _____

Receipt No. _____

APPLICATION AND AFFIDAVIT.

I, _____ (Give full Christian name.) _____ (Male or female.), of _____

(Give post-office address.) _____, do hereby

apply to enter, under the act of December 29, 1916 (Public, No. 290, 64th Cong.), subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same, _____ section _____

township _____, range _____, meridian, containing _____ acres.

I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I _____ citizen of _____

(Applicant must state whether native born, naturalized, or has filed declaration of intention to become a citizen. If not native born, certified copy of naturalization or declaration of intention, as case may be, must be filed with this application.)

the United States, and am _____; that this

(State whether the head of a family, married or unmarried, or over 21 years of age, and if not over 21, applicant must set forth the facts which constitute him the head of a family.)

application is honestly and in good faith made for the purpose of actual settlement, use, and improvement by the applicant, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement and improvements necessary to acquire title to the land applied for; that I am not acting as agent for any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not, directly or indirectly, made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation, or syndicate, whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I have not heretofore made any entry under the timber and stone, desert land, or preemption laws, except as follows: _____

I have not heretofore made a homestead entry except as follows: _____

I further state that the land is not occupied and improved by any Indian; that it does not contain merchantable timber and no timber except _____; is not susceptible of irrigation from any known source of water supply, except the following areas: _____

(Here give subdivisions and areas of the land, if any, susceptible of irrigation.) _____

and does not contain any water hole or other body of water needed or used by the public for watering purposes; that the land is chiefly valuable for grazing and raising forage crops.

(Sign here with full Christian name.) _____

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to

me personally known (or has been satisfactorily identified before me by _____); that I verily believe

(Give full name and post-office address.)

affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me at my office in _____

(Town.)

(County and State.)

within the _____ land district, this _____ day of _____, 191 .

(Official designation of officer.)

We, _____, of _____, and _____, of _____, do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____); and that said affidavit was duly subscribed (Give full name and post-office address.)

and sworn to before me at _____ this _____ day of _____, 191 .

(Official designation of officer.)

UNITED STATES LAND OFFICE AT _____, 191 .

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of December 29, 1916; that there is no prior valid adverse right to the same, and has this day been allowed.

Register.

UNITED STATES CRIMINAL CODE.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act Mar. 4, 1909, 35 Stat., 1111.)

FORM OF APPLICATION FOR ADDITIONAL ENTRY.

4-016a.

[Form approved by the Secretary of the Interior Jan. 18, 1917.]

DEPARTMENT OF THE INTERIOR.

STOCK-RAISING HOMESTEAD ENTRY—ADDITIONAL.

[Act of Dec. 29, 1916.]

United States Land Office _____

Serial No. _____

Receipt No. _____

APPLICATION AND AFFIDAVIT.

I, _____, of _____, do here apply (Give full Christian name.) (Post-office address.) to enter under the act of December 29, 1916 (Public No. 290, 64th Cong.), subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same, _____ section _____.

township-----, range-----, meridian, containing-----acres,
as additional to my homestead entry No. -----, made-----
at-----land office for-----
section-----, township-----, range-----, meridian-----.

I do solemnly swear that this application is made for my exclusive benefit as an addition to my original homestead entry, and not directly or indirectly for the use or benefit of any other person or persons, whomsoever; that this application is honestly and in good faith made for the purpose of actual settlement, use, and improvement; that I will faithfully and honestly endeavor to comply with all the requirements of the law; that I have not heretofore made an entry under the timber and stone, desert land, or preemption laws, except as follows: -----; that I have not heretofore made an entry under the homestead laws (other than that above described) except -----.

I further state that the land applied for is not occupied and improved by any Indian, and is unoccupied and unappropriated by any person claiming the same under the public-land laws other than myself; that the land now applied for and that embraced in my original entry above described do not contain merchantable timber and no timber except -----; is not susceptible of irrigation from any known source of water supply except the following areas: -----

(Here give the subdivisions and areas of the land, if any, susceptible of irrigation.)
and does not contain any water hole or other body of water needed or used by the public for watering purposes; that the land is, chiefly valuable for grazing and raising forage crops.

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by -----); that I verily believe -----

(Give full name and post-office address.)

affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office in ----- (Town.) ----- (County and State.)
within the ----- land district, this -----
day of -----, 191-----.

(Official designation of officer.)

We, -----, of -----,
and -----, of -----,
do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by -----); and that said affidavit was duly subscribed and sworn to before me at -----

(Give full name and post-office address.)

this ----- day of -----, 191-----.

(Official designation of officer.)

UNITED STATES LAND OFFICE AT -----, 191-----.

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of December 29, 1916; that there is no prior valid adverse right to the same, and has this day been allowed.

Register.

UNITED STATES CRIMINAL CODE.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act, Mar. 4, 1909; 35 Stat., 1111.)

FORM OF BOND FOR MINERAL CLAIMANTS.

Know all men by these presents, that citizen... of the United States, or having declared intention to become .. citizen... of the United States, as principal..., and and
(Give full name and address.)
(My or our.)
(Give full name and address.)

as sureties, are held and firmly bound unto the United States of America, for the use and benefit of the hereinafter-mentioned entryman or owner of the hereinafter-described land, whereof homestead entry has been made, subject to the act of December 29, 1916 (Public, 290), in the sum of dollars (\$....), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this day of, 19... The condition of this obligation is such, that, whereas, the above-bounden ha.. acquired from the United States the deposits (together with the right to mine and remove the same) situate, lying, and being within the of section, township, range, M., land district, and whereas homestead entry, serial No., has been made at land office, of the surface of said above-described land, under the provisions of said act of December 29, 1916, by

Now, therefore, if the above-bounden parties, or either of them, or the heirs of either of them, their executors or administrators, upon demand, shall make good and sufficient recompense, satisfaction and payment unto the said entryman or owner, his heirs, executors, or administrators, or assigns, for all damages to the entryman's or owner's crops or tangible improvements upon said homesteaded land as the said entryman or owner shall suffer or sustain or a court of competent jurisdiction may determine and fix in an action brought on this bond or undertaking, by reason of the above-bounden principal's mining and removing of the deposits from said described land, or occupancy or use of said surface, as permitted to said above-bounden principal.. under the provisions of said act of December 29, 1916, by, then this obligation shall be null and void; otherwise and in default of a full and complete compliance with either or any of said obligations, the same remain in full force and effect.

Signed and sealed in the presence of and witnessed by the undersigned:

.....
Principal.
(The principal should sign first.)

.....
Residence

.....
Surety.
Residence

.....
Residence

.....
Surety.
Residence

(Witnesses should give full names and addresses.)

(The principal and sureties should sign full names and attach seals.)

PUBLIC NO. 290—64TH CONGRESS.

An Act To provide for stock-raising homesteads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved public land in reasonably compact form: *Provided, however*, That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands."

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided*, That where any person qualified to make original or additional entry under the provisions of this Act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands.

SEC. 3. That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact form so far as may be subject to the provisions of this act, and secure title thereto by compliance with the terms of the homestead laws: *Provided*, That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this act, subject to the requirements of law as to residence and improvements, which, together with the former entry, shall not exceed six hundred and forty acres: *Provided further*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land: *Provided further*, That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than \$1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

SEC. 4. That any homestead entryman of lands of the character herein described who has not submitted final proof upon his existing entry shall have the right to enter, subject to the provisions of this act, such amount of contiguous lands designated for entry under the provisions of this act as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to \$1.25 for each acre thereof.

SEC. 5. That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this act, make additional entry for and obtain patent to contiguous lands designated for entry under the provisions of this act, which, together with the area theretofore acquired under the homestead law, shall not exceed six hundred and forty acres, on proof of the expenditure required by this act on account of permanent improvements upon the additional entry.

SEC. 6. That any person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, who has entered or acquired under the homestead laws, prior to the passage of this act, lands of the character described in this act, the area of which is less than six hundred and forty acres, and who is unable to exercise the right of additional entry herein conferred because no lands subject to entry under this act adjoin the tract so entered or acquired or lie within the twenty-mile limit provided for in this act, may, upon submitting proof that he resides upon and has not sold the land so entered or acquired and against which land there are no encumbrances, relinquish or reconvey to the United States the land so occupied, entered, or acquired, and in lieu thereof, within the same land-office district, may enter and acquire title to six hundred and forty acres of the land subject to entry under this act, but must show compliance with all the provisions of this act respecting the new entry and with all the provisions of existing homestead laws except as modified herein.

SEC. 7. That the commutation provisions of the homestead laws shall not apply to any entries made under this act.

SEC. 8. That any homestead entrymen or patentees who shall be entitled to additional entry under this act shall have, for ninety days after the designation of lands subject to entry under the provisions of this act and contiguous to those entered or owned and occupied by him, the preferential right to make additional entry as provided in this act: *Provided*, That where such lands contiguous to the lands of two or more entrymen or patentees entitled to additional entries under this section are not sufficient in area to enable such entrymen to secure by additional entry the maximum amounts to which they are entitled, the Secretary of the Interior is authorized to make an equitable division of the lands among the several entrymen or patentees, applying to exercise preferential rights, such division to be in tracts of not less than forty acres, or other legal subdivision, and so made as to equalize as nearly as possible the area which such entrymen and patentees will acquire by adding the tracts embraced in additional entries to the lands originally held or owned by them: *Provided further*, That where but one such tract of vacant land may adjoin the lands of two or more entrymen or patentees entitled to exercise preferential right hereunder, the tract in question may be entered by the person who first submits to the local land office his application to exercise said preferential right.

SEC. 9. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the Gen-

eral Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this act.

SEC. 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this act but may be reserved under the provisions of the act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands: *Provided further*, That such driveways shall not be of greater number or width than shall be clearly necessary for the purpose proposed, and in no event shall be more than one mile in width for a driveway less than twenty miles in length, not more than two miles in width for driveways over twenty and not more than thirty-five miles in length, and not over five miles in width for driveways over thirty-five miles in length: *Provided further*, That all stock so transported over such driveways shall be moved an average of not less than three miles per day for sheep and goats and an average of not less than six miles per day for cattle and horses.

SEC. 11. That the Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this act for the purpose of carrying the same into effect.

Approved December 29, 1916.

STATE OF CALIFORNIA ET AL.

Decided January 27, 1917.

SCHOOL INDEMNITY SELECTION—WHEN NEW BASE MAY BE SUBSTITUTED.

Where a State, in an indemnity school land selection, tenders lands in a national forest which *constitute a valid base*, and said lands are subsequently eliminated from the forest, the substitution of new base will be permitted.

Robinson v. Lundrigan (227 U. S., 173) distinguished.

VOGELSANG, *First Assistant Secretary*:

March 12, 1907, the State of California filed indemnity school land selection 01482 for lot 1, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 7, T. 13 S., R. 8 E., M. D. M., 159.99 acres, San Francisco, California, land district, offering as base the SW. $\frac{1}{4}$, Sec. 16, T. 9 S., R. 5 E., S. B. M., 160 acres, within the former San Jacinto National Forest.

It appears that all of said Sec. 16 was eliminated from said national forest by Executive proclamation of November 8, 1912, and no part of said section is shown to be mineral in character nor otherwise lost from the grant to the State for common school purposes, as made by the act of March 3, 1853 (10 Stat. 244).

August 7, 1916, the Commissioner of the General Land Office, citing as authority therefor departmental decision in the case of the State of California *et al.* (44 L. D. 468), held said selection

for cancellation. From this decision appeal has been taken to the Department, and it is strongly urged that because the State has transferred the tract in question to William H. Lewis and the loss thereof will be to him irreparable because said land is a part of the land used by him as a farm in San Benito County, California, the selection should remain intact and the transferee receive title to the land.

It is held by the Supreme Court in the case of *Robinson v. Lundrigan* (227 U. S., 173) that—

Where an application for public lands is finally rejected on the ground that the soldier on whose claim the application is based had no right thereto, the case is closed and cannot be kept open for perfection by substituting the claim of another soldier, and the instant the application is rejected the land becomes subject to appropriation by another.

An application must depend upon its particular basis; it cannot be kept open for the substitution of another right than that upon which it was made; and if a practice to do so existed in the Department it was wrong. *Moss v. Dowman*, 176 U. S., 413.

Even though the Secretary keeps the case open and afterwards rules in favor of the subsequent entryman, the original applicant is not divested of any rights, for no right had attached.

In this case the base or right first offered for the land in question was invalid when offered, while in the case at bar the base offered by the State of California was valid—that is, was land which could properly be made the basis for selection on March 12, 1907, when the selection was made, and remained valid base until eliminated from the national forest by Executive proclamation of November 8, 1912. This clearly distinguishes the question presented in the case at bar from the question decided by the Supreme Court in the case of *Robinson v. Lundrigan*, *supra*, and the Department is of the opinion that under the circumstances disclosed by the record in this case the State of California may substitute new base for that originally offered, and retain intact the selection of the land it has transferred to Lewis. Such action will injure no one and will remove from the case all the hardships delineated in the argument in support of this appeal. The decision appealed from is accordingly modified, and the case is remanded to the General Land Office for further proceedings in accordance herewith.

If valid base is submitted by the State of California within 90 days from notice hereof, the decision appealed from will be reversed and the selection remain intact; but if the State does not take appropriate action within the time allowed, which may be extended by the Commissioner upon sufficient cause shown, then and in that event, the decision appealed from will stand affirmed.

CLINTON C. REED.

Decided January 27, 1917.

CROW INDIAN LANDS—RAILROAD RIGHT OF WAY—ADJUSTMENT OF ENTRY TO SURVEY.

While, ordinarily, public lands are surveyed and disposed of by rectangular subdivisions without segregation of railroad rights of way or deduction for the area covered thereby, such practice is not applicable to farm units in the Huntley irrigation project, where the Indians were paid for such of their lands as were covered by the right of way of the Northern Pacific Railway Company.

HUNTLEY IRRIGATION PROJECT—FARM UNITS.

Where farm units have been regularly fixed and surveyed and entries under the homestead and reclamation laws made therefor, surveys or farm units will not be so amended as to enlarge or diminish the acreage without the consent of the entrymen.

VOGELSANG, *First Assistant Secretary*:

Clinton C. Reed has appealed from decision of October 13, 1916, by the Commissioner of the General Land Office, requiring further payment to be made in completion of his homestead entry within the Huntley irrigation project, Montana.

The entry was made November 3, 1909, for farm unit "N," Sec. 26, T. 3 N., R. 29 E., M. M., containing 55.50 acres. Final proof was submitted November 5, 1913, and payment was made of the Indian price of \$4 per acre for the area according to the plat under which the entry was made.

May 22, 1916, a supplemental plat of survey was approved whereon the land embraced in farm unit "N" is shown as lot 5, in said section, and the Commissioner adjusted the entry to conform to the later plat, which shows the said lot to contain 68.58 acres. The entryman was thereupon required to make payment for the additional land at the rate of \$4 per acre.

The entryman urges that it is unjust to make the additional charge, as he paid the full price required under the plat which governed his entry. Also, that the additional land is covered by the right of way of the Northern Pacific Railway Company and is not available for use by the entryman.

It appears that the first farm unit plat, according to which the entry was made, shows this unit as bounded on the north by the right of way of the Northern Pacific Railway Company. It does not include the right of way but on the contrary the southern line of the right of way area was made to define the northern line of the unit. This was eminently proper from the standpoint of practical use for irrigation purposes, and the respective units in the project were ad-

visedly confined to one side of the right of way. However, it further appears that on the later survey plat the areas were enlarged by extending them to the center line of the right of way, whereby a strip 200 feet wide was added to this and other adjacent units. The entrymen who had made entry according to the first plat and who had made payments as required for the area shown on that plat, were, upon the approval of the new plat, called upon for additional payment to equal the Indian price for the added land. In this case the area added was about 13 acres and the entryman was ruled to pay therefor at the rate of \$4 per acre. This is the price which the Indians were to receive upon disposal of the lands in said reservation.

Any attempted change in such unit to reduce or enlarge the area thereof after entry and without the consent of the entryman would be in violation of the rights of such claimant. Moreover, the added area covered by the right of way is not Indian land. It was granted to the railway company as a right of way for railway purposes by the act of July 10, 1882 (22 Stat., 153), entitled "An act to accept and ratify an agreement with the Crow Indians for the sale of a portion of their reservation in the Territory of Montana required for the use of the Northern Pacific Railroad, and to make the necessary appropriations for carrying out the same."

Said act ratified an agreement with the Indians, which provided:

That for the consideration hereinafter mentioned the Crow tribe of Indians do hereby surrender and relinquish to the United States all their right, title and interest in and to all that part of the Crow Reservation situate in the Territory of Montana and described as follows. * * *

For the right of way thus granted the railway company was required to pay \$25,000 to the Government for the benefit of the Indians. The lands embraced in the right of way thus ceased to be Indian lands. Neither are they in the category of public lands. The Government can grant no interest therein. *Northern Pacific Railway Company v. Townsend* (190 U. S., 267). See, also, *E. A. Crandall* (43 L. D., 556).

The Department has not overlooked the prevailing practice whereby public lands ordinarily are surveyed and disposed of by rectangular subdivisions without segregation of such rights of way and without deduction for the area covered thereby. But that practice is not applicable to lands occupying the status of those here involved.

It is therefore directed that the later survey plat be amended so as to close the survey of the respective units upon the lines of the right of way.

The decision appealed from is reversed.

FILING OF TOWNSHIP PLATS.**INSTRUCTIONS.****DEPARTMENT OF THE INTERIOR,****GENERAL LAND OFFICE,***Washington, D. C., January 29, 1917.***THE SECRETARY OF THE INTERIOR.**

SIR: I recommend that the instructions of October 21, 1885 (4 L. D., 202), relative to the filing of plats of survey, be amended to read as follows:

When an approved plat of survey of any township or part of a township is transmitted to you by the Surveyor General, you will not regard such plat as officially received and filed in your office until the following regulations have been complied with:

1. You will at once post a notice in a conspicuous place in your office, specifying the township or part of township that has been surveyed and stating that the plat of survey will be filed in your office on a day to be fixed by you and named in the notice, which shall be not less than thirty days from the date of such notice, and that on and after said day the lands in such township or part of township will be subject to proper disposition. If any of the lands are embraced in any withdrawal, the notice should so state.

2. You will send a copy of such notice to the postmaster in the town in which your office is situated and postmasters of the postoffices nearest the land, to the clerk or clerks of courts of record in the town where the land office is located and in the county where the land is situated, and such adjoining county or counties deemed advisable by you.

3. You will also furnish, as a matter of news, copies of the notice to the newspapers published in the town where the land office is situated and in the neighborhood of the land, particularly in the county in which the land is located and to newspapers known to have a circulation in the vicinity of the land.

It has been lately pointed out by the local office at Jackson, Mississippi, that to literally carry out the instructions of October 21, 1885, would require that office to send copies of the notice to be published to clerks of courts in 81 counties of the State, and to the newspapers, which run up into the hundreds in such 81 counties.

There is but one district land office in each of the following States: Alabama, Arizona, Florida, Louisiana, Michigan, Mississippi, Missouri, Oklahoma and Wisconsin, and in none of them except Arizona is there any unsurveyed public land except isolated tracts found here and there, such as small islands.

What has been stated relative to Mississippi is applicable to a great extent to the other States mentioned.

It is believed that the proposed regulations would give all needed publicity.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, February 6, 1917:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

UNITED STATES ex rel. HENDERSON v. LANE.¹

In the Supreme Court of the District of Columbia.

MANDAMUS—PUBLIC LANDS.

1. The general rule is that the courts have no power to interfere with the performance by the Land Department of the Government of the administrative duties devolving upon it.
2. Upon a petition for mandamus to compel the Secretary of the Interior to accept and approve relator's homestead application, where it appeared that the lands in question were not public lands of the United States when he made his entry (settlement?), but that the State of Florida had a good title to them in fee simple; that the State, for reasons with which the relator was not concerned, quit-claimed the land to the United States and as a part of the same transaction regained title thereto pursuant to a contract between the United States and the State of Florida; held that the decision of the Secretary in refusing to accept and approve the entry was right, but whether right or wrong it was a decision of a question involving the public lands of the United States within his exclusive jurisdiction.
3. The writ of mandamus can not be converted into a writ of error.

Law, No. 58,875. Decided January 29, 1917.

Hearing upon a petition for mandamus to compel the Secretary of the Interior to accept and approve a homestead application. Petition dismissed.

Mr. P. H. Loughran and *Mr. B. W. Marshall* for the relator.

Mr. C. E. Wright for the respondent.

Mr. Justice GOULD delivered the opinion of the Court:

This is a petition for mandamus to compel the Secretary of the Interior "to accept and approve" relator's homestead application to order the register and receiver of the proper land office to permit an entry of a certain tract of land under the homestead laws, and "to cause due and proper evidence of the acceptance, approval, and allowance of entry under the said homestead application to be delivered to your petitioner."

The answer of the respondent states that he has by law exclusive jurisdiction in all matters pertaining to applications for the sale or other disposition of public lands under the homestead and other public land laws; that the consideration and determination of such applications involve the exercise of his judgment and discretion; that he has considered the matters set forth in the petition in a cause before the Land Department instituted by the relator, entitled *Allen B. Henderson v. The State of Florida* (Docket No. D-28591) and has rendered therein three decisions, one on appeal affirming the decision of the Commissioner of the General Land Office, one on motion for rehearing, and one on petition for the exercise of his supervisory

¹ Reprinted from the *Washington Law Reporter* for Feb. 2, 1917 (45 Wash. Law Rep., 66), by the courteous permission of Richard A. Ford, Esquire, its Editor.

authority; that in and by said decisions, and after full and exhaustive consideration of all the facts of record, and after consideration of all relevant matters of law, he has decided that the relator had no valid claim or right in the land in controversy and that his homestead application should neither be accepted nor approved.

The answer further denies all the averments of fact in the petition, save as the same formally appear in the answer.

Issue was joined on the answer and some oral testimony taken; the latter, however, is unimportant as bearing upon the substantial issue in the case.

The facts in the case, which are practically undisputed, are as follows: In 1871 the State of Florida applied under the Swamp Land Act of September 28, 1850, for certain lands situate in Sec. 18, T. 57 S., R. 39 E., within what is now known as the Gainesville, Florida, land district; under this application the State became entitled to the S. $\frac{1}{2}$ and the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ of said section, being in the aggregate 400 acres. Through clerical error, patent was issued to the State in 1880 for the E. $\frac{1}{2}$ of said section, comprising only 320 acres. Thereby the State failed to get title to the SW. $\frac{1}{4}$ of the section for which it had applied, but did get title to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ (the land in controversy) for which it had *not* applied. The State, in 1883, sold the land for which it had applied, to wit, the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of said section to Sir Edward James Reed, at that time, as is evident, having no title to the SW. $\frac{1}{4}$ of said section. In 1913 the Land Office discovered this error in the patent and called upon the State to execute a reconveyance of the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ (the land in controversy). By the act of March 3, 1891, any action by the United States to cancel the patent to this land was barred by limitation; so that the title of the State of Florida was then undisputed. To adjust the matter and to protect its grantee, the State agreed to reconvey to the United States the said N. $\frac{1}{2}$ NE. $\frac{1}{4}$; but as a consideration it was agreed between the State and the Commissioner of the General Land Office that the State should regain title to said tract by filing thereon what is known as a "Swamp Land Indemnity Certificate" under the Act of March 2, 1855. This agreement was performed by the delivery of a quitclaim deed from the State to the United States, the deed being dated January 27, 1914, and delivered by the Governor of the State personally to the Commissioner of the General Land Office on March 10, 1914. At the same time there was also delivered to said Commissioner Swamp Land Indemnity Certificate No. 19, with an application based thereon for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ aforesaid. This deed to the United States and the application of the State for the land under the certificate were forwarded by the Commissioner of the Land Office to the local land officers at Gainesville, Florida, with directions to record the deed and

note the application on the records of said office. Proper steps were taken to perfect the title of the State under the Indemnity Certificate, but on October 14, 1914, relator filed a protest with said local land officers, against the indemnity selection, together with a homestead application, in which he alleged that he had moved on said tract of land in November, 1913, had thereon established a house, had lived there continuously, and had cultivated the land. He prayed that the State's selection be rejected and that his homestead application be accepted.

Annexed to the relator's petition in this case is a copy of the final decision of the Interior Department in which it appears that there had been two prior hearings adverse to petitioner. The decision recites the facts substantially as above stated and holds that the deed from the State and the selection of the same land by the State under the Indemnity Certificate were a single transaction and that at no time did Henderson acquire a right to enter said land under the homestead law. The opinion concludes: "The whole transaction was, in effect, an amendment of the patent erroneously issued to the State for land not selected by it. By reconveying and at the same time filing application for selection of the land, to the end that the requirements of the law preliminary to the issuance of patent should be met, it did not lose its right thereto. Such reconveyance was a matter of importance to the land office where the error occurred, and was wholly immaterial to the State in so far as this land is concerned, as it held the full legal and equitable title thereto."

Respondent made a motion to dismiss the petition on the ground that the Department had never passed upon relator's qualification, residence or cultivation, with reference to his right to a homestead entry upon the land in controversy. These qualifications are set out in the petition, but are denied in the answer; issue was joined but no proof was offered upon the issue. For this Court to compel the Secretary to "accept and approve" relator's homestead entry upon the record made in this proceeding would not only be usurping the Secretary's exclusive jurisdiction but would be doing so without evidence upon which to determine the relator's right to make an entry:

But the broader question involves the jurisdiction of the Court to coerce the action of the respondent under the facts above stated.

In its latest statement of the law upon this subject the Supreme Court (*Lane v. U. S. ex rel. Mickadiet*, decided May 22, 1915) says there can be no dispute concerning the general rule that courts have no power to interfere with the performance by the Land Department of the administrative duties devolving upon it.

In the often quoted case of *U. S. ex rel. McBride v. Schurz*, 102 U. S. 378, the Court said:

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

Again in *Brown v. Hitchcock*, 173 U. S. 473, the Court said:

As a general rule no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such Departments and carried into the courts; those Departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. When the legal title to these lands shall have been vested in the State of Oregon, or in some individual claiming a right superior to that of the State, then is inquiry permissible in the courts, and that inquiry will appropriately be had in the courts of Oregon, state or Federal.

In *U. S. ex rel. Knight v. Lane*, 228 U. S. 6, the Court said:

Inasmuch as the decision of the Secretary revoking his prior approval of the proposed adjustment was not arbitrary or capricious, but was given after a hearing and in the exercise of a judgment and discretion confided to him by law, it cannot be reviewed, or he be compelled to retract it, by mandamus.

It would be difficult to formulate a question more decidedly calling for the exercise of judgment and discretion than the one involved in the record of this case. There had to be a decision as to whether the land in question was subject to homestead entry. The facts concerning it were practically indisputable and the solution turned upon the application of legal principles. It appeared that relator was a trespasser upon the land *ab initio*; it was not public lands of the United States when he made his entry. The State of Florida had a perfectly good title to it in fee simple. For reasons which do not concern the relator, the State quitclaimed the land to the United States and as a part of the same transaction regained title by the use of the Swamp Indemnity Certificate, heretofore described. This was done in pursuance of a contract entered into between the parties, whereby the United States agreed that the State should convey the land to the United States and should be, *eo instanti*, restored to its title. Under well recognized principles of equity, and upon the application of the maxim, "Equity looks on that as done which is agreed to be done," the United States held the legal title, after the quitclaim deed from the State was delivered, merely as the trustee for the State of Florida; just as the vendor of real estate is the trustee for the vendee after he has signed an enforceable contract to sell it, and before he has delivered a deed conveying it. The consideration upon which the agreement between the United States and

the State of Florida was based does not concern relator. He does not occupy the position of an innocent purchaser or an entryman in good faith. The lands upon which he made entry were not "unappropriated public lands" of the United States but lands belonging to the State of Florida under a patent from the United States issued more than thirty years before relator's trespass; and as already stated, the State's title was good in fee simple.

These considerations lead to the conclusion that the decision of the Secretary was right. But whether right or wrong, it was a decision of a question involving the public lands of the United States, within his exclusive jurisdiction, according to repeated holdings of the Supreme Court of the United States and the Court of Appeals of the District. For this court to review it, would be to convert the writ of mandamus into a writ of error.

The record fails to show that the decision of the Secretary was either arbitrary or capricious. There were three hearings in the Department in which relator was represented by able and enthusiastic counsel, and full consideration was given the somewhat difficult and complicated question involved. The conclusion reached, whether erroneous or not, is not a subject of review in this proceeding.

The Clerk will enter an order dismissing the petition.

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21. The approval of a right of way under the act of March 3, 1891, does not of itself prevent a designation of the land on application for enlarged homestead entry under the act of March 4, 1915; and where it appears that the applicant for entry will be able to comply with the requirement of section 4 of the enlarged homestead act as to the area to be cultivated, taking the entire area embraced in the application into consideration, notwithstanding the whole or part of certain legal subdivisions may be subject to a right of way for an irrigation reservoir, the entire area may be designated; but if it appear that it will be impossible for the applicant to comply with the requirements as to cultivation, the legal subdivisions subject to the right of way rendering such compliance impossible should be excluded from the designation----- 27

22. An application to make second entry filed under the enlarged homestead act for undesignated land and showing *prima facie* that the land is subject to entry under said act, which application is suspended to

Homestead—Continued.

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allow the applicant to file petition for designation and to furnish evidence of his qualifications to make second entry, segregates the land during the period of suspension against a subsequently filed application----- 34

23. It is incumbent upon an applicant to make entry under the enlarged homestead act to show that the land applied for is of the character subject to entry under that act, notwithstanding the land has been designated by the Government as of such character----- 197

24. The fact that land contains timber suitable for ordinary agricultural uses, but not of sufficient merchantable value to justify a timber entry of the land, will not prevent entry thereof under the provisions of the enlarged homestead act, where the land is otherwise of the class subject to such entry----- 197

25. Upon allowance of an application to enter accompanied by a petition for designation under the enlarged homestead act, the rights of the applicant attach as of the date of the filing of the application and petition, and all rights under a conflicting intermediate application are thereupon *eo instanti* terminated as to the land in conflict----- 557

26. Instructions of October 30, 1916 (Circular No. 514), under act of September 5, 1916, concerning additional entries in Idaho under the enlarged homestead act----- 493

27. Instructions of December 26, 1916 (Circular No. 517), regarding lands in North and South Dakota and Kansas not subject to designation under the enlarged homestead act----- 585

28. Where the widow of a deceased homestead entryman makes an additional entry under section 3 of the enlarged homestead act as amended by the act of February 11, 1913, it is incumbent upon her to make full compliance with the requirements of the homestead law in the matter of residence, as well as cultivation and improvement, upon either the original or additional entry----- 104

29. The provision in the act of June 6, 1912, requiring "double the area" of cultivation in the case of entries under section 6 of the enlarged homestead act, contemplates double the proportional part or fraction required to be cultivated in the case of other entries—that is, not

Homestead—Continued.

less than one-eighth of the area during the second year of the entry and not less than one-fourth thereafter. 150

30. Where entry for eighty acres was made under the enlarged homestead act as additional to an original homestead entry for 160 acres, and final proof was submitted and patent issued upon the original and additional entries as one entry, the entryman may be permitted to make a further entry for eighty acres under section 3 of the enlarged homestead act as amended by the act of March 3, 1915, as additional to his combined entry, where the land so taken was not subject to entry at the date he made his first additional entry. 20

31. Additional entry under the act of March 3, 1915, may be made only where the land in the original entry, as well as that in the additional application, has been designated as subject to entry under the enlarged homestead act; and where part of the original entry is susceptible of irrigation at a reasonable cost, and the land embraced therein is therefore not susceptible of designation, there is no basis for additional entry under the act of March 3, 1915. 202

32. Credit for military service may be allowed, under section 2305, Revised Statutes, on entries under section 6 of the enlarged homestead acts of February 19, 1909, and June 17, 1910, upon compliance with the provision of said section requiring residence, cultivation, and improvement for the period of at least one year. 324

33. Credit for military service may be allowed, under section 2305, Revised Statutes, on entries under section 6 of the enlarged homestead act of June 17, 1910, upon compliance with the provision of said section requiring residence, cultivation, and improvement for the period of at least one year. 451

34. The three-year homestead act of June 6, 1912, does not have the effect to reduce to three years the five-year period of cultivation required upon enlarged homestead entries under section 6 of the act of June 17, 1910. 449

35. It is not necessary that one who has submitted final proof and received patent on his original entry shall have remained in continuous ownership of the land in order to entitle him to an additional entry under section 3 of the enlarged homestead act as amended March 3,

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1915, provided he owns and occupies the same at the time of making application for the additional entry. 325

Imperial Valley Lands.

See *Desert Land*, 2, 7.

1. Circular of May 13, 1916, under act of March 3, 1909, providing for the sale of isolated tracts or lots in Imperial County, California. 88

Indian Lands.

See *Mineral Land*, 1, 2; *Railroad Grant*, 11-13; *Repayment*, 7; *Survey*, 4.

GENERALLY.

1. Instructions of July 1, 1916, governing the opening of Fort Berthold Indian lands. 204

2. Circular (No. 489) of July 21, 1916, under act of July 3, 1916, concerning homestead entries on ceded portion of Wind River Indian Reservation. 314

3. Regulations of Oct. 7, 1916, concerning applications for Colville Indian lands. 489

See *hereof*, 14.

4. Circular (No. 510) of October 11, 1916, under acts of March 4, 1913, and April 11, 1916, concerning Indian occupants of railroad lands. 322

5. Where indemnity selection lists by the Northern Pacific Railway Company for lands within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian Reservation, restored to the public domain and opened to certain classes of entries by the act of May 1, 1888, were rejected on the ground that such lands were not subject to selection by the company as indemnity, and during the pendency of an appeal by the company from such action the act of March 3, 1911, was passed, declaring such lands a part of the public domain and "open to the operation of laws regulating the entry, sale, or disposal of the same," and the company thereafter filed supplemental lists for the lands theretofore selected, tendering the necessary fees and receiving receipt therefor, the rights of the company thereunder are superior to any rights acquired by the subsequent tender of a homestead application not based upon settlement prior to the filing of the supplemental lists. 17

6. Where indemnity selection lists by the Northern Pacific Railway Company for lands within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian Reservation, restored to the public domain and opened to certain

Indian Lands—Continued.

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classes of entries by the act of May 1, 1888, were rejected on the ground that such lands were not subject to selection by the company as indemnity, and during the pendency of an appeal by the company from such action the act of March 3, 1911, was passed, declaring such lands a part of the public domain and "open to the operation of laws regulating the entry, sale, or disposal of the same," and the company thereafter, pursuant to instructions of September 30, 1913, from the General Land Office, filed supplemental lists for the lands theretofore selected, tendering the necessary fees and receiving receipt therefor, the rights of the company thereunder are superior to any rights acquired by settlement or the filing of a homestead application subsequent to the date of receipt of the instructions of September 30, 1913, by the local officers, although prior to the filing of the supplemental lists-----

193

7. The provision in section 3 of the act of February 20, 1904, authorizing the sale of the ceded Red Lake Indian lands remaining unsold at the expiration of five years from the date of the first sale under that act without any conditions except the payment of the purchase price, was repealed by the act of February 16, 1911, after which date said lands were subject to appropriation only by homestead entry and the payment of the purchase price as provided by said latter act.-----

456

ALLOTMENT.

8. Instructions of January 11, 1917, governing patents in fee on allotted lands in Blackfeet, Fort Peck, Flathead, Okanogan, and Yakima irrigation projects-----

600

9. Instructions of November 10, 1916, concerning allotment selections, by Turtle Mountain Indians.-----

534

10. Instructions of October 16, 1916 (Circular No. 511), concerning exchange of allotments on ceded lands, under act of March 3, 1909.-----

492

11. A fee patent issued on an Indian allotment should include and describe the legal subdivisions covered by the allotment, inclusive of areas covered by approved railroad rights of way under the act of March 2, 1899, with the usual clause that the conveyance is subject to such rights of way.-----

473

12. The relinquishment of allotted lands in the Uintah and White River Ute Indian Reservation and the selection in lieu thereof of lands

Indian Lands—Continued.

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within the grazing reserve established by the joint resolution of June 19, 1902, as modified by the acts of March 3, 1903, and March 3, 1905, is authorized and governed by the provisions of the act of October 19, 1888, and not the exchange provisions of the act of March 3, 1909, which are applicable only where allotted lands are exchanged for ceded lands.-----

509

13. Allotted lands relinquished under the act of October 19, 1888, as a basis for selection of other Indian lands in lieu thereof, are not subject to disposal under the homestead laws.-----

509

14. Lands in the north half of the Colville Indian Reservation, allotted in severalty and held under trust patents, constitute a reservation of the United States within the meaning of section 18 of the act of March 3, 1891, and the department has jurisdiction, with consent of the allottee or after condemnation proceedings, to approve, under that act, rights of way across the same for an irrigation canal. Departmental decision in *Icicle Canal Co.*, 44 L. D., 511, distinguished.-----

563

15. The acts of Congress authorizing allotment of Sioux Indian lands contemplate allotments only to living persons; and where one entitled to allotment dies without allotment having been made or selection filed by him or in his behalf, the right perishes with him and his heirs are not entitled to allotment based upon his right.-----

568

16. The Executive order of August 24, 1889, annulled the prior order of May 17, 1887, and directed allotment work anew on the Yankton Reservation. *Held*, the right to allotment must be determined in accordance with conditions existing August 24, 1889, the date of the President's later order.-----

568

Insanity.

1. Where the right of an insane entryman to patent under the act of June 8, 1880, fully vested prior to his death, such right descends to his heirs, and patent may issue to them upon submission of proper proof.-----

2

2. Departmental decision in *Heirs of Anthony Siankiewicz*, 38 L. D., 574, modified in so far as it holds that the act of June 8, 1880, "can be applied only in case the entryman be living at the time the application is made to offer proof"-----

4

Insanity—Continued.

3. As long as a proceeding of guardianship remains in force in a court having jurisdiction of such matters, the appointment of a guardian is conclusive upon the land department, and an adjudication that a man is of infirm mind, disqualified to conduct his own affairs, so that the appointment of a guardian is necessary for his protection, closes the question against any inquiry by the land department.----- 191

4. Service of notice of contest against an entryman legally adjudged insane may be made by delivering a copy of the notice to the statutory guardian or committee of the entryman----- 467

5. The act of June 8, 1880, providing for the protection of the rights of homestead settlers who become insane, has no application where the entryman prior to becoming insane failed to comply with the law in good faith----- 467

Instructions and Circulars.

See *Tables of*, pages XIX to XXII.

Internal Revenue Stamps.

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Isolated Tracts.

See *Imperial Valley Lands*, 1.

Judicial Restraint.

See *Contestant*, 7, 8.

Land District.

1. Regulations governing entries in more than one land district. (Circular No. 505)----- 486

Mandamus.

1. The general rule is that the courts have no power to interfere with the performance by the Land Department of the Government of the administrative duties devolving upon it----- 649

2. Upon a petition for mandamus to compel the Secretary of the Interior to accept and approve relator's homestead application, where it appeared that the lands in question were not public lands of the United States when he made his entry (settlement?), but that the State of Florida had a good title to them in fee simple; that the State, for reasons with which the relator was not concerned, quitclaimed the land to the United States and as a part of the same transaction regained title thereto pursuant to a contract between the United States and the State of Florida; *held* that the decision of the Secretary in refusing to accept and approve the entry was

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right, but whether right or wrong it was a decision of a question involving the public lands of the United States within his exclusive jurisdiction----- 649

3. The writ of mandamus can not be converted into a writ of error.---- 649

Marriage.

See *Citizenship*, 1; *Homestead*, 1.

Meander Lines.

See *Mining Claim*, 9-11; *Survey*, 3.

Military Service.

See *Homestead*, 10, 32, 33; *Rest-dence*, 3.

1. During operations in Mexico or along the border. See Circular No. 506, of Sept. 27, 1916----- 488

Mineral Land.

See *Homestead*, 16; *Railroad Grant*, 8-10; *School Lands*, 8.

1. Regulations of March 27, 1916, concerning mineral lands on Papago Indian Reservation----- 537

2. Instructions of December 5, 1916, concerning notice of applications for mineral lands on Papago Indian Reservation----- 539, 540

3. As withdrawal of land for inclusion in a petroleum reserve, based upon an examination and report of its mineral character, establishes *prima facie* its character as mineral, and one thereafter seeking classification of the land as nonmineral assumes the burden of proof to overcome such *prima facie* established mineral character----- 464

Mining Claim.**GENERALLY.**

1. Instructions of November 10, 1916, concerning locations on Shoshone or Wind River lands----- 533

2. Where exclusions are made from mining claims of supposed conflicts with a prior patented claim, and the position of the prior patented claim as actually marked, defined and established upon the ground, is not identical with its position as represented upon the plat and described in the field notes of survey, and the supposed conflicts have no existence in fact, the areas represented by such theoretical exclusions pass under the patents to the claims, and are therefore not subject to appropriation by subsequent location----- 10

3. A senior applicant for patent under the mining laws does not by the filing of an adverse claim against

Mining Claim—Continued.

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a conflicting junior application, and the institution of suit thereon, abandonment or forfeit any rights under his senior application; and the pendency of such adverse suit does not operate as a stay of proceedings in the land department on the junior application pending determination of the suit..... 158

4. An area included in a pending application under the mining laws can not properly be included in a subsequent mineral application..... 158

5. Section 2326, Revised Statutes, and the concluding portion of the preceding section, relating to proceedings between adverse claimants under the mining laws, have reference to unperfected mining claims to areas subject to patent under the mining laws, and not to tracts the legal title to which has at the date of the patent application passed out of the Government, and have no application to a case where the question is whether the area involved is public land of the United States and as such is susceptible of conveyance by a United States patent..... 330

6. The smallest legal subdivisions authorized by statute according to which placer claims on surveyed lands may be located and described are ten-acre tracts, normally in square form; but where location of a claim by ten-acre tracts in square form would necessitate the inclusion of lands which have passed out of the public domain or which are embraced in adjoining mining claims, the claim may be located and described by rectangular ten-acre tracts, as provided by paragraphs 22 to 24 of the regulations of July 1, 1901, even though not in square form..... 174

7. Where the locator of a mining claim conveys all his right, title, and interest in a strip thereof to a railroad company, over which the line of road is constructed, the area so conveyed should be excluded from application for patent for the claim..... 212

8. Where entry has been made for a group of mining claims, patent can not issue thereon for individual claims noncontiguous to each other, where there has been no discovery upon the intervening claims upon which they depend for their contingency; but the entry may be permitted to stand and patent issued for the particular claim upon which the notice and plat were actually posted, provided a valid discovery and sufficient improvements were made thereon..... 501

Mining Claim—Continued.

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BOUNDARIES.

9. Reference in a patent for a mining claim to the mineral lot number of the claim is a sufficient reference to the plat and field notes of survey of such claim to render them admissible in evidence for the purpose of showing that the lines of such claim bordering on a water front are in fact meander lines..... 330

10. The rule as to meander lines is applicable to mining claims, and where in the course of an official patent survey of a mining claim abutting upon a navigable body of water a meander line has been run, which follows as nearly as practicable the shore line of the water, such shore line, and not the meander line, must be taken as a boundary of the claim when patented according to the plat and field notes of the survey..... 331

11. Where one of the boundaries of a patented mining claim is a navigable body of water, all accretions formed after survey and prior to entry and patent of the tract passed under the patent, and all accretions that may thereafter form become the property of the riparian proprietor..... 331

Minnesota Drainage Laws.

See *Swamp Lands*, 2-6.

Minor.

See *Reclamation*, 4.

National Forests.

See *Saline Lands and Salt Springs*, 1, 2; *School Lands*, 3, 9; *States and Territories*, 6.

1. Lands which at the date of the proclamation creating a national forest are covered by a patent are excepted from the force and effect of the proclamation; but in event of reconveyance by the patentee, after recommendation for the institution of suit to cancel the patent on the ground of noncompliance with law prior to its issue, the lands at once become part of the national forest..... 448

2. Upon cancellation, on the ground of fraud, of patent to lands within the exterior limits of a national forest, entry thereof having been made prior to the creation of the forest, such lands become part of the forest and are not subject to entry as unreserved public land..... 542

New Mexico Lands.

See *Public Lands*, 1; *Small Holding Claims*, 1-3.

Nitrate Lands.

See *Coal, Oil, and Gas Lands*, 1.

Notice.

See *Contest, 3; Contestant, 6, 7.*

Occupancy.

See *Homestead, 11, 17, 35.*

1. The mere occupancy of public land, without right under any statute to acquire title thereto, does not exclude it from appropriation by another under the public land laws----- 315

Officers.

See *Final Proof, 2.*

Oil Lands.

See *Coal, oil, and Gas Lands, 1, 5.*

Oklahoma Lands.

See *States and Territories, 1.*

Papago Indian Reservation.

See *Mineral Land, 1, 2.*

Patent.

See *Coal, Oil, and Gas Lands, 1; Indian Lands, 8, 11; Insanity, 1; Mining Claims, 7-9; Right of Way, 3.*

1. Plats and field notes referred to in patents may be resorted to for the purpose of determining the limits of the areas that passed under the patents----- 330

2. There being no statutory provision requiring final certificates and patents issued upon homestead entries of lands over which pass rights of way acquired under the act of March 3, 1891, to contain a notation of exception thereof, and such notation not being necessary to the protection or preservation of such rights of way, the Land Department declines to include such notation in the final certificates and patents----- 460

3. Where the patent issued upon a railroad indemnity selection erroneously includes a tract not embraced in that selection, but embraced in another indemnity selection by the same company, then pending, but subsequently rejected, the patent as to that tract is voidable and not void, and suit to vacate and annul the patent as to said tract must be brought within the period fixed by the act of March 2, 1896----- 166

4. Where entry has been made for a group of mining claims, patent can not issue thereon for individual claims noncontiguous to each other, where there has been no discovery upon the intervening claims upon which they depend for their contiguity; but the entry may be per-

Patent—Continued.

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mitted to stand and patent issued for the particular claim upon which the notice and plat were actually posted, provided a valid discovery and sufficient improvements were made thereon----- 501

5. The legal effect of cancellation of a patent to public land by final decree of a proper tribunal is to revest title in the Government and restore the land to the public domain; but such cancellation does not *ipso facto* restore the land to entry, and, until notation of the cancellation upon the records of the local land office, no rights are acquired by the filing of an application to make entry----- 596

6. While cancellation, by final decree, of a patent to public land, does not operate to restore said land to entry, the act of May 14, 1880 (21 Stat., 140), requires that upon the filing of a relinquishment the land involved shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office----- 597

Phosphate Lands.

See *Coal, Oil, and Gas Lands, 1.*

Potash Lands.

See *Coal, Oil, and Gas Lands, 1.*

Power Sites.

1. Instructions of August 24, 1916, relating to inspection and hydrometric data in connection with power permits----- 326

Practice.

See *Repayment, 7.*

1. Rule 46 of Practice amended May 16, 1916----- 91

2. A motion for continuance in a contest proceeding, based on an allegation of inability to procure the attendance of witnesses at the time and place set for hearing, should set out in substance the matter which it is expected the absent witnesses would testify to, divulge the names of the witnesses, aver that their absence is not due to collusion and consent of contestant, and state that the application for continuance is not for the purpose of delay----- 168

3. The filing of a motion for continuance by a contestant does not act as a stay of proceedings; but contestant must appear at the time and place set for hearing and be ready to proceed with the case in event the application for continuance is denied; and failure to so appear constitutes a default----- 168

Practice—Continued.

4. A decision by the Commissioner of the General Land Office respecting the right of the register of a local land office to make additional homestead entry, based upon the mere request of the register for an opinion as to his qualifications to make such entry, is not a final decision "relating to the disposal of public lands" within the meaning of Rule 74 of Practice, and no appeal will lie therefrom----- 182

Preference Right.

See *Contest*, 2; *Contestant*, 1, 2, 6.

Public Lands.

1. Instructions of January 23, 1917, concerning alleged unlawful inclosure of public lands in New Mexico----- 607

Railroad Grant.

See *Indian Lands*, 4-6, 11; *Repayment*, 3, 6; *Settlement*, 1; *Small Holding Claims*, 1-3.

GENERALLY:

1. The Department will not at this late date question the right of the Northern Pacific Railway Company to select lands under the act of March 2, 1899, as successor to the Northern Pacific Railroad Company, on the ground that at the date of that act the Northern Pacific Railroad Company, named as grantee therein, had been foreclosed and was no longer a going concern, and that the act was therefore ineffective for want of an existing grantee----- 6

2. The return of the surveyor general as to the character of land constitutes but a small element of consideration when the question as to the character of the land is at issue----- 25

3. When the character of land selected by a railroad company is put in issue, the burden is on the company to show by clear and convincing evidence that the land is of a character subject to the grant----- 25

COAL LAND.

4. Administrative order of May 23, 1916, authorizing selection by and patenting to the Northern Pacific Railway Company of lands withdrawn for coal classification----- 152

5. Executive order of May 20, 1916, modifying certain coal-land withdrawals so as to permit the Northern Pacific Railway Company to select and take patents for lands embraced therein----- 151

6. The act of July 2, 1864, and the joint resolution of May 31, 1870, making a grant to the Northern Pa-

Railroad Grant—Continued.

cific Railroad Company, are in no wise amended or modified by the act of March 3, 1909, providing for the issuance of restricted patent to agricultural entrymen of lands subsequently classified, claimed, or reported as valuable for coal----- 155

7. Coal lands are subject to indemnity selection by the Northern Pacific Railway Company under the act of July 2, 1864, and the joint resolution of May 31, 1870, in lieu of nonmineral lands lost to the company's grant----- 152

MINERAL LAND.

8. To except lands from a railroad grant as mineral in character it is not necessary that a discovery of mineral be shown such as would serve as a basis for mineral patent; but it is sufficient if the land be shown to have a *prima facie* mineral character and a prospective value for mineral greater than any other known value----- 25

9. Lands containing deposits of diatomaceous earth, in such quantity and of such quality as to render them valuable therefor, are mineral lands and excepted from the grant to the Central Pacific Railway Company----- 223

10. Land upon which there is no present indication of mineral, nor any geological evidence that would warrant a mineral finding, should not be held mineral in character within the meaning of the excepting clause in the grant to the Southern Pacific Railroad Company merely on the premise that future prospecting might disclose evidences of mineral----- 327

INDIAN LANDS.

11. Upon the purchase by a railway company of lands within an Indian reservation, under the acts of March 3, 1909, and May 6, 1910, for reservoirs, material, ballast, or the planting of trees, a patent should be issued to the company for such lands, with a provision that the grant is made solely for the purpose of the use of the land as specified in the company's application to purchase, and that in event of abandonment of such use the land shall revert to the United States or its grantee----- 177

12. Entries under the public land laws embracing lands applied for and patented to a railway company under said acts, and the patent issued thereon, should be noted as subject to the rights of the railway company under its application and

Railroad Grant—Continued.

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patent, and similar notation should be made in the case of trust or fee patents upon Indian allotments embracing any such lands----- 177

13. Lands in the Pyramid Lake Indian reservation are excepted from the grant to the Central Pacific Railway Company made by the acts of July 1, 1862, and July 2, 1864----- 502

INDEMNITY.

14. A railroad indemnity selection filed during the preference right period of sixty days from the date of the filing of the township plat accorded the State by the act of August 18, 1894, within which to make selection, should not be rejected but received and held suspended until final adjudication of the rights of the State under any selection filed by it during the preference right period----- 37

Railroad Lands.

See *Indian Lands*, 4-6, 11; *Railroad Grant*; *Repayment*, 3, 6; *Settlement*, 1.

Reclamation.

See *Indian Lands*, 8; *Survey*, 5.

GENERALLY.

1. Regulations approved May 18, 1916----- 385

2. Paragraph 103 of General Reclamation Circular approved May 18, 1916, amended----- 491

3. Instructions of July 26, 1916, under act of July 26, 1916, authorizing extension of payments under the reclamation act----- 317

4. Minors are not qualified to take by assignment under the act of June 23, 1910, farm units upon which reclamation charges have not been paid in full----- 22

5. The proviso to section 5 of the act of June 25, 1910, as amended by the act of February 18, 1911, and section 10 of the act of August 13, 1914, that "where entries made prior to June 25, 1910, have been or may be relinquished, in whole or in part, the lands so relinquished shall be subject to settlement and entry under the reclamation law," applies only to entries of record next previous to the passage of the act, and can not be invoked upon the basis of a relinquished entry preceding the entry of record at the date of the passage of the act----- 504

WATER RIGHT.

6. Instructions of September 26, 1916, concerning water-right applications by corporations not organized for profit----- 541

Reclamation—Continued.

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7. Where a water-right application for land held in private ownership has been canceled for default in payment of building, operation, and maintenance charges, such application may be reinstated upon full payment of all accrued charges----- 23

Records.

1. Internal-revenue stamps on certified copies no longer required (Circular No. 503)----- 485

2. Cost of certified copies (Circular No. 504)----- 485

Relinquishment.

See *Contestant*, 6; *Patent*, 6.

1. Proof of a contract by an entryman to relinquish a portion of his entry in favor of a prior settlement claim, not in writing but resting only in parol, should not be accepted after the entryman is dead and can make no defense----- 466

Repayment.

1. Instructions of October 25, 1916 (Circular No. 513)----- 520

2. Claims for moneys deposited by individuals to cover the cost of surveys in accordance with the provisions of sections 2401 and 2402, Revised Statutes, are not subject to assignment, and the depositors only are entitled to any repayment of moneys so deposited----- 29

3. Where a purchaser of lands in an even-numbered section within the primary limits of a railroad grant paid double-minimum price therefor, as required by departmental decisions and instructions, he is not entitled to repayment of the excess paid by him over and above the minimum price----- 96

4. In the absence of any fraud or attempted fraud, an applicant under the timber and stone act, upon rejection of his application, is entitled under section 2 of the act of March 26, 1908, to repayment of the ten-dollar filing fee deposited by him in connection with his application----- 182

5. Where, by reason of a clerical error in the application, a homestead entry was allowed for land not intended to be taken, and an application to amend the entry to embrace the land desired was rejected because of the fact that it was then embraced in another entry, the entryman, upon relinquishment of the erroneous entry, is entitled to repayment of the fees and commissions paid by him in connection with said entry----- 323

6. Where at the time of commutation of a homestead entry of

Repayment—Continued.

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lands within the primary limits of the grant to the Atlantic and Pacific Railroad Company made by act of July 27, 1866, the land was properly rated at \$2.50 per acre, under section 2357, Revised Statutes, and payment was made at that price, the entryman is not entitled to repayment, as excess, of any portion of the amount paid, because of the fact that the price of such lands was subsequently, by the act of July 16, 1886, reduced to \$1.25, that act having no retroactive effect.----- 452

7. The provision of Rule 46 of the Rules of Practice that an entryman may submit final proof during the pendency and after trial of a contest against the entry and complete the same "with the exception of payment of the purchase money or commissions," is applicable to entries of surplus or unallotted Rosebud Indian lands under the act of March 2, 1907; and where the local officers erroneously required an entryman of such lands who submitted commutation proof under section 3 of the act of March 2, 1907, to make payment of the balance of the purchase price, contrary to the provisions of Rule 46, the entryman is entitled, upon cancellation of the entry as result of the contest, to repayment of such balance, as excess payment, under the provisions of the act of March 26, 1908 ----- 530

Reservation.

1. Abandoned military reservations in Nevada ----- 492

Reservoir Site.

See *Right of Way*, 2.

Residence.

See *Settlement*, 4, 5.

1. Circular (No. 492) of July 27, 1916, under act of July 3, 1916, concerning leave of absence to homestead settlers on unsurveyed lands.----- 320

2. There is no special rule applicable to school teachers respecting the residence required upon a homestead entry, the statute operating on all settlers alike, regardless of their occupations.----- 190

3. Credit for military service may be allowed, under section 2305, R. S., on entries under section 6 of the enlarged-homestead acts of February 19, 1909, and June 17, 1910, upon compliance with the provision of said section requiring residence, cultivation, and improvement for the period of at least one year.----- 324

Revised Statutes.

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Right of Way.

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See *Homestead*, 21; *Indian Lands*, 11, 14; *Patent*, 2; *Survey*, 4.

1. Paragraph 53 of circular of June 6, 1908, relating to rights of way through unsurveyed land, amended May 24, 1916 ----- 91

2. It is the policy of the land department to secure the utilization of reservoir sites to the largest extent possible, and where that purpose can be best attained by joint or double use of reservoir sites such use will be permitted.----- 4

3. There being no statutory provision requiring final certificates and patents issued upon homestead entries of lands over which pass rights of way acquired under the act of March 3, 1891, to contain a notation of exception thereof, and such notation not being necessary to the protection or preservation of such rights of way, the land department declines to include such notation in the final certificates and patents.----- 460

Riparian Rights.

See *Mining Claim*, 11.

Saline Lands and Salt Springs.

1. Lands in national forests chiefly valuable on account of saline springs or saline deposits are subject to location and disposal under the mining laws only.----- 620

2. The fact that the State of Utah may, in satisfaction of its grant under section 8 of the enabling act of July 16, 1894 (28 Stat., 107-109), resort to saline as well as agricultural lands within the State, confers no right to select saline lands, so long as they remain in a national forest.----- 620

School Lands.

See *Contestant*, 3.

GENERALLY.

1. Possession and improvement of a tract of unsurveyed land under the act of March 28, 1908, prior to and at the time of survey, by one who at the date of identification of the land by survey was disqualified to make desert entry thereof, do not except the tract from the school grant to the State.----- 471

2. The State of Washington acquires no vested right or title under the grant of sections 16 and 36 made to said State, for school purposes, by the enabling act of February 22, 1889 (25 Stat., 676), until said sections have been identified by survey ----- 593

School Lands—Continued.

3. Where school sections, prior to public survey, are included within a national forest, they may be administered in all respects as are other lands within the reservation, and are subject to entry under the provisions of the act of June 11, 1906 (34 Stat., 233)----- 593

4. A mere settlement upon public land is not such an appropriation as will prevent school indemnity selection thereof; and where the settler subsequently abandons his claim, the pending school indemnity selection attaches----- 184

5. While the Commissioner of the General Land Office may, in his discretion, avail himself of the aid of a contestant to determine the validity or invalidity of a school indemnity selection, his refusal to accept such aid is not the denial of a legal right, and his exercise of discretion in such matter will not be controlled by the Department unless abuse thereof is clearly apparent----- 458

6. A tract of land embraced in a public water reserve under the act of June 25, 1910, is not subject to school indemnity selection by the State----- 551

7. A tract of land situated in a large area of public grazing lands, and which is chiefly valuable as a watering place for stock, by reason of a spring located thereon, should be retained in public ownership, subject to the possible granting of a right of way for the construction of a reservoir for stock watering purposes under the act of January 13, 1897----- 551

8. Title does not vest in the State under a school indemnity selection until the selection has been duly approved; and a discovery of mineral prior to such approval will defeat the selection----- 590

9. Where a State, in an indemnity school land selection, tenders lands in a national forest which constitute a valid base, and said lands are subsequently eliminated from the forest, the substitution of new base will be permitted. *Robinson v. Lundrigan* (227 U. S., 173) distinguished----- 644

Scrip.

1. There is no provision of law specifically authorizing or requiring the Secretary of the Interior to accept the surrender of Sioux half-breed scrip and issue new scrip of lesser denomination in lieu thereof;

Scrip—Continued.

and such subdivision and reissue will be allowed, if at all, only in cases where it appears from the records of the General Land Office that the scrip is free from all conflicting claims----- 49

2. Valentine scrip may be located upon unsurveyed lands, and the locator has three months from the filing of the township plat of survey within which to adjust the location to legal subdivisions----- 469

3. A location of Valentine scrip may embrace noncontiguous tracts----- 469

Secretary of the Interior.

See *Coal, Oil, and Gas Lands*, 4; *Mandamus*, 1-3.

Selection.

See *Railroad Grant*, 5, 7, 14; *School Lands*, 4-6, 8, 9; *States and Territories*, 2.

Settlement.

See *Homestead*, 2-5, 13, 14; *School Lands*, 4; *States and Territories*, 3, 4; *Timber and Stone Act*, 3.

1. Where settlement was made upon unsurveyed land, and it developed on survey that part of the land, including the subdivision upon which the building in which the settler resided was located, was embraced in a prior selection by the Northern Pacific Railway Company under the act of March 2, 1899, such fact does not defeat the settler's rights to the remaining tracts covered by his settlement claim----- 92

2. A settlement right extends to every part of all legal subdivisions embraced in the claim, and if the settler is compelled to yield a portion of his claim to a prior right, his claim, even though his settlement was made prior to survey of the land, may be recognized and perfected as to the remainder, notwithstanding the elimination of the land covered by the prior claim renders his claim noncontiguous----- 94

3. The statute giving a right of entry as against a settler who does not assert his claim within three months after the filing of the township plat of survey applies only to subsequent settlers, and does not give a mere applicant, without settlement, any right as against an actual settler, notwithstanding the settler may have failed to assert his claim within the statutory period----- 211

4. To preserve his rights as against an adverse claimant a settler must maintain residence upon the

Settlement—Continued.

land pending determination of the conflicting claims..... 586

5. In a controversy involving simultaneous settlement claims the land in conflict should not be awarded to one of the parties merely because he has shown a higher degree of diligence in subsequent residence, cultivation, and improvement, where both parties in good faith made and have maintained their settlement claims..... 586

6. One who in good faith makes actual settlement on a forty-acre legal subdivision has an equitable right thereto superior to that of one who claims the same tract by virtue of simultaneous settlement on an adjoining forty-acre legal subdivision in the same technical quarter section..... 586

7. The Land Department will not undertake to determine the rights acquired by settlement upon unsurveyed lands until such lands become subject to disposition and application is filed to make entry thereof... 561

Settlers.

See *Small Holding Claims*, 1, 2; *States and Territories*, 3, 4; *Timber and Stone Act*, 3.

Shoshone or Wind River Lands.

See *Mining Claim*, 1.

Sioux Half-breed Scrip.

See *Scrip*, 1.

Small Holding Claims.

1. Instructions of January 24, 1917 (Circular No. 522), under the act of April 28, 1904, for the relief of small holding settlers within the limits of the Atlantic and Pacific Railroad Company's grant in New Mexico..... 617

2. No proof of settlement claims will be hereafter accepted, with a view to procuring relinquishment thereof by the Atlantic and Pacific Railroad Company under the act of April 28, 1904, until by examination in the field such claims shall be found to be valid..... 80

3. In making selections under the act of April 28, 1904, in lieu of lands hereafter relinquished for the benefit of settlement claims, the Atlantic and Pacific Railroad Company will be required to select an area in compact form approximating that relinquished..... 80

Soldiers' Additional.

See *Homestead*, 15-17.

Soldiers' Declaratory Statement.

See *Homestead*, 13, 14.

State Selections.

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See *Saline Lands and Salt Springs*, 2; *School Land*; *States and Territories*.

States and Territories.

See *Contest*, 1; *Saline Lands and Salt Springs*, 1, 2; *School Lands*, 1, 2, 8, 9.

1. As to new States, not entitled to representation in Congress by the apportionment under the census of 1860, the amendment (act of July 23, 1866, 14 Stat., 208), to the act of July 2, 1862 (12 Stat., 503), granting lands to the States, for the purposes of education, upon their admission to the Union, was intended by Congress as a pledge, and is ineffectual as a grant without further legislation..... 543

2. Under the act of August 18, 1894 (28 Stat., 372, 394), a right to select the land involved is given the State for a limited period, but such right does not exclude all other forms of appropriation, and applications tendered by others should not be rejected, but received and held suspended to await the event of the State's action..... 574

3. The provision in section 3 of the act of May 14, 1880 (21 Stat., 140), limiting the time within which a settler must assert his claim to three months from the date of settlement when on surveyed land, or three months from the date of filing of the township plat when on unsurveyed land, was intended solely for the protection of the rights of settlers *as among themselves*, and is without application to conflicting claims of a settler and a State or railroad company under its grant..... 582

4. In the administration of the public-land system it is a fundamental principle that the settler shall be preferred over claimants who seek to assert scrip or other rights to the public domain, and in pursuance of this principle the Department will give equitable consideration to asserted settlement claims, in the presence of a scrip application for the land by one without claim to equitable consideration... 583

5. Under the provisions of the act of February 25, 1867 (14 Stat., 409), granting lands in aid of the construction of The Dalles Military Wagon Road, the road as actually constructed defines the limits of the grant..... 613

6. The application of a State for the survey of lands under the act

States and Territories—Contd. Page.

of August 18, 1894 (28 Stat., 394), will not prevent the inclusion of the lands within a national forest----- 620

Statutes.

See *Acts of Congress and Revised Statutes Cited and Construed*, pages XXII-XXVI.

Stock-raising Homesteads.

See *Homesteads*, 18.

Surface Rights.

See *Coal, Oil, and Gas Lands*, 1.

Survey.

See *Mining Claim*, 6, 9-11; *Repayment*, 2; *School Lands*, 3; *Settlement*, 1, 7.

1. Regulations of January 13, 1917 (Circular No. 520), governing applications for resurveys under the act of March 3, 1909, as amended--- 603

2. Instructions of January 29, 1917, relative to the filing of township plats----- 648

3. A meander line is a line run in the survey of particular portions of the public domain bordering on a stream or other body of water, not as a boundary of the tract surveyed, but for the purpose of defining the sinuosities of the bank or shore of the water and as a means of ascertaining the quantity of land within the surveyed area subject to sale--- 330

4. While, ordinarily, public lands are surveyed and disposed of by rectangular subdivisions without segregation of railroad rights of way or deduction for the area covered thereby, such practice is not applicable to farm units in the Huntley irrigation project, where the Indians were paid for such of their lands as were covered by the right of way of the Northern Pacific Railway Company- 646

5. Where farm units have been regularly fixed and surveyed and entries under the homestead and reclamation laws made therefor, surveys or farm units will not be so amended as to enlarge or diminish the acreage without the consent of the entrymen----- 646

Swamp Lands.**GENERALLY.**

1. The reference in paragraph 3 of the instructions in the case of State of Louisiana, 32 L. D., 270, 277, to selection lists which had theretofore been presented, "which purported to include, and should have included, the whole of the swamp lands" in a given township, contemplates cases wherein the provisions of paragraph 6 of the circular of September 19, 1891, 13 L. D., 301, requiring a cer-

Swamp Lands—Continued. Page.

tificate that selection lists cover the full and final claim of the State to lands under the swamp land acts in the townships specified and that the State waives all claim under said acts to lands in said townships not selected, have been complied with, and is not applicable where the State has not been required to file the certificate mentioned----- 103

MINNESOTA DRAINAGE LAWS.

2. Circular of April 15, 1916, revising instructions of April 24, 1913, under the Minnesota drainage act of May 20, 1908----- 40

3. Circular of January 26, 1917, under act of September 5, 1916----- 623

4. Where the highest bidder for unentered lands sold for drainage charges under section 2 of the act of May 20, 1908, fails to consummate his purchase by entry within the time prescribed by the act, a subsequent purchaser of the land under section 6 will be required to pay the unpaid fees, commissions, and purchase price to which the United States may then be entitled, the entire sum at which the land was sold at the sale, including any excess over and above the drainage charges, and, where bid in by the State, interest on the amount bid by the State at the rate of seven per cent per annum----- 12

5. Where there has been more than one sale of lands by the State of Minnesota for delinquent drainage taxes under the act of May 20, 1908, and the respective purchasers failed to consummate their purchases by entry, a subsequent purchaser from the State under that act will be required to pay the excess bid made by the last preceding purchaser, together with the other payments required to be made under the act, but will not be required to pay the excess bids of any earlier preceding purchasers----- 516

6. A homesteader who fails to pay the drainage tax under the act of May 20, 1908, and whose land is bought in by the State for the delinquent tax, does not by purchase of the tax certificate from the State become entitled to purchase the land for cash, and thus evade his obligation to reside upon the land under his homestead entry; but his purchase of the tax certificate constitutes merely a redemption of the tax sale, and he will be required to continue compliance with the requirements of the homestead law----- 199

Tax Sale.

See *Swamp Lands*, 2-6.

Timber and Stone Act.

1. The submission by a special agent of a tentative appraisal of lands within nine months from the tender of a sworn statement therefor by an applicant under the timber and stone act, which appraisal was not approved and filed in the local office within that period, does not constitute an official appraisal, and the applicant is entitled, under section 19 of the timber and stone regulations, to make entry of the lands within thirty days after the expiration of the nine months' period, at the price, not less than \$2.50 per acre, specified by him in his application as the reasonable value thereof -----

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2. Where an applicant to purchase under the timber and stone act protests the appraisement of the land and applies for reappraisement, he is not entitled, under paragraph 19 of the timber and stone regulations, upon failure of reappraisement within nine months from application therefor, to purchase at the price named in his sworn statement, but must await the reappraisement and pay the price fixed thereby -----

106

3. No rights are acquired by the filing of a timber and stone declaratory statement for land at that time inhabited by a *bona fide* settler, notwithstanding the settler may thereafter abandon the land -----

184

Timber Cutting.

1. Instructions of December 14, 1916, concerning sales of timber on unreserved lands in Alaska -----

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2. The act of March 4, 1913, authorizing the Secretary of the Interior to sell any timber on public

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lands which has been killed or permanently damaged by forest fires, makes no provision for payment of the proceeds of such sales to persons who subsequently make entries of lands from which the timber has been so sold -----

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Timber Sales.

See *Timber Cutting*.

Township Plat.

See *Survey*, 2.

Trespass.

See *Coal, Oil, and Gas Lands*, 3.

Turtle Mountain Allotments.

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Unlawful Inclosure.

See *Public Lands*, 1.

Valentine Scrip.

See *Scrip*, 2, 3.

Wagon Road Grant.

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Water Reserve.

See *School Lands*, 6, 7.

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See *Desert Land*, 10, 11; *Reclamation*, 6, 7.

Widow, Heirs, Devisee.

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Withdrawal.

See *Coal, Oil, and Gas Lands*, 1; *School Lands*, 7.

Witnesses.

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Words and Phrases.

1. "Double the area" of cultivation, in act of June 8, 1912, referring to entries under section 6 of the enlarged homestead act, construed -----

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